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The Supreme Court of the United States has, in the Counselman case, spoken with no uncertain meaning upon the subject of the constitutional privileges of witnesses as to the giving of criminating testimony. It will be recalled that this was the case which involved the question whether a witness before a grand jury, who refused to testify as to alleged violations of the interstate commerce law, on the ground that he could not do so without incriminating himself, was within his right in so doing.

Judge Gresham, upon the hearing in the lower court, declared that the witness was in contempt for refusing to answer the questions, calling attention to section 860 of the Revised Statutes, which provides that "no pleading of a party nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or his estate in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture." He took the position that this statute rendered it unnecessary for the witness to claim the privilege secured by the fifth amendment to the constitution, inasmuch as the statute would not permit his admissions to be used against him. See 32 Cent. L. J. 1, 386.

The Supreme Court, however, reverse this decision, and hold that Counselman was entitled to refuse to answer the questions. The contention that a witness was not entitled to plead the privilege of silence except in a criminal case against himself, was not the language of the constitution, which is that no person should be compelled in any criminal case to be a witness against himself. The court thinks that this provision should have a broad construction in favor of the right which it was intended to secure.

Upon the subject of the statute which Judge Gresham held rendered it unnecessary for the witness to claim the constitutional protection, the court said that this provision, of course, protected Counselman against the use of his testimony against himself or his property, but it could not and would not prevent the use of his testimony to search out other testimony to be used against him. It could not prevent the obtaining and the use of evidence which should be attributed directly to the testimony he might give under compulsion. The section was not co-extensive with the constitutional provision, and legislation could not detract from the privilege afforded by the constitution, for a mere act of congress could not amend the constitution. Upon this latter point the court said: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least, unless it is so broad as to have the same extent. We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

This opinion is an important one from any point of view, but it is especially so in its bearing upon the enforcement of the interstate commerce law, which, so far as prosecutions are concerned, will be rendered more or less ineffective. Still, there would be no justification, legal or otherwise, for interpreting away a constitutional guarantee of personal liberty in order to secure the effective enforcement of any particular piece of legislation.

We observe that some of the legislative fathers of the interstate commerce law have announced their intention to amend the law so as to avoid in some way the effect of the decision.

We agree with *Bradstreet's*, that "it is hard to see how this can be done as regards cases falling within the protection of the fifth

amendment. No legislation that congress can enact can amend that amendment or place without the pale of its protection any persons who are within it now."

NOTES OF RECENT DECISIONS.

MASTER AND SERVANT—CONTRACT OF HIRING — BREACH — DAMAGES.— In Mt. Hope Cemetery Assn. v. Weidenman, the Supreme Court of Illinois hold that where a servant, after being discharged, sues for breach of the contract of hiring before the termination of the period covered thereby, he can recover damages up to, but not after, the time of the trial. The court say:

The averment that the plaintiff has always been ready and willing to perform was not intended to and does not show that the plaintiff was seeking to keep the contract obligatory on him after suit brought. Its purpose was accomplished in showing that the plaintiff was guilty of no default at the time of bringing his action. If, after judgment rendered in this action, the defendant should demand performance of the unexpired term, the plaintiff would not be obliged to perform, the recovery being for the present damages occasioned by breach of the contract by the defendant. In such cases the averment of readiness and willingness to perform is not an issuable averment. 2 Saund. Pl. & Ev. pt. 1, p. 351; Wilkinson v. Gaston, 9 Q. B. 137. Wood, in his work on Master and Servant, in the section before cited, says: "When a servant is discharged without sufficient legal excuse, before the expiration of his term, he has his choice of two remedies: He may elect to treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may sue for a breach of the contract, and recover his probable damages for the breach; or he may, in some cases, wait until the term is ended, and sue for the actual damages he sustained, which can in no case exceed the wages provided for in the contract for the entire term." As we have seen, this court has held that the contract may be kept in force, and installments recovered as they severally fall due, (Hamlin v. Race, *supra*); but that is unimportant here. Upon notice of his discharge the plaintiff had the right to immediately bring action for a breach of the contract, or he might have waited until the expiration of the term of employment. If he sued before the termination of the contract, and the action was not tried until after the period of service stipulated for had expired, the plaintiff would be entitled to recover for the whole time, less payments made, and such sum as he had or might by reasonable diligence have earned subsequent to the breach. Suth. Dam. 433, and authorities cited; Fuller v. Little, 61 Ill. 22; Howard v. Daly, 61 N. Y. 362; School Directors v. Crews, 23 Ill. App. 369. But the plaintiff not only brought his action before the expiration of the contract by its terms, but also had trial before that time. The measure of damages in that case is not so easily determined, nor are the authorities uniform. There is no difficulty in determining the elements of damage, but for what time they should be recovered. By the English rule, as it would seem, he might recover for any loss during the entire unexpired term of employment, while by the rule adopted in many of the American States the recovery is limited to damages sustained to the time of the trial. Fowler v. Armour, 24 Ala. 194; McDaniel v. Parks, 19 Ark. 671; Rogers v. Parham, 8 Ga. 190; Gordon v. Brewster, 7 Wis. 355; Sutherland v. Wyer, 67 Me. 64; Wright v. Falkner, 37 Ala. 274; Prichard v. Martin, 27 Miss. 305; Alfaro v. Davidson, 40 N. Y. Super. Ct. 87; Machine Co. v. Brighton, 44 Iowa, 159; Lewis v. Insurance Co., 61 Mo. 534. In Wood's Mayne on Damages, (page 167), it is said: "When the service is to be commenced at a future day, and before the arrival of that day the employer positively renounces the covenant, even without doing anything to incapacitate himself from performing at the appointed day, the servant may sue at once, and the jury in assessing the damages would be justified in looking at all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff, down to the day of trial;" citing Hochester v. De La Tour, 2 El. & Bl. 678; Church Ward v. Queen, L. R. 1 Q. B. 204-208; Frost v. Knight, L. R. 7 Exch. 111, 41 Law J. Exch. 78. The same author, in his work on Master and Servant, (page 250), after stating the rule laid down by Smith in his work on Master and Servant on this subject, says that he (Smith) goes on to state that in such action the servant "may not only recover for wages actually earned, but also for his probable loss by being unable to secure other equally profitable employment, even to the extent of the entire period covered by the contract." Mr. Wood, however, adds: "And there is no question but that is the rule in England, but I am aware of no case in this country in which a similar rule has been adopted; but, on the contrary, the drift of American decision is opposed to any such rule of recovery, and limits the judgment to the actual loss at the day of trial." In view of the fact that the servant may die or become incapable of performing before the expiration of the term of his employment, the uncertainty of the wages or emoluments he may be enabled to earn in the future, we are disposed to follow the rule that the plaintiff shall be limited to his actual loss at the time of trial. It must necessarily be that the actual loss of the plaintiff between the trial and the expiration of the term cannot be definitely determined, and any amount allowed must, from the very nature of things, be largely speculative. By the adoption of the rule limiting recovery to the day of trial all difficulty would be avoided in the assessment of his damages. There is no hardship in this, for, as we have seen, if he desires so to do, he may lie by until the expiration of the term. It is clear that the servant wrongfully discharged is not entitled, as a matter of law, to recover the full amount of the contract price, even after the expiration of the term, if he has earned other wages, or received other compensation for his time and labor, after the breach of the contract. All such sums as he has earned or might by reasonable diligence have earned must be deducted, and, if he has earned more than the price agreed to be paid, his recovery would be limited to nominal damages merely. It is apparent that it is impossible to tell whether from the day of trial to the expiration of the term he will earn more or less than the contract price. The plaintiff can recover only his actual loss. It is, however, insisted by appellant that recovery should be had only to the time of suit brought, and the case of Hamlin v. Race, *supra*, is referred to as supporting this contention. As we have seen, the suit was there brought for the recovery of installments of wages, keeping the contract in force; and it was held that no recovery

could be had for an installment not due at the commencement of the action. We there said: "Had appellee, when discharged, terminated the agreement, and sued on the breach of the contract, it may be that a different rule [from the one there announced] might have prevailed." The case there being considered is clearly distinguishable from the one at bar. There the recovery was not sought for a breach of the contract, but for the recovery of wages fixed by the contract and under the contract; and it was properly held that, as the plaintiff sought to recover under the contract, he was limited to the recovery of wages due at the time suit was brought. We are of opinion that the wages earned were recoverable under the *indebitatis assumpsit* count. The court, however, erred in allowing recovery for damages accruing after the trial and before the expiration of the term. The damages should have been limited to recovery for the wages earned and for the loss of the plaintiff by reason of the breach from the date thereof to the trial.

REWARD—CAPTURE OF THIEF.—The Appellate Court of Indiana, in Everman v. Hyman, decide, among other things, that a person who has captured a thief, for whose apprehension a reward has been offered, is entitled to the reward, although he made the capture without knowledge of the offer. New, C. J., says:

In Dawkins v. Sappington, 26 Ind. 199, it was held that a person performing the service for which a reward was offered was entitled to the reward, although he did not know, at the time of the performance, that the reward had been offered, and therefore could not have been influenced or induced to act from the offer. The same case is cited as authority in Board v. Wood, 39 Ind. 345. See, also, Auditor v. Ballard, 9 Bush, 572, where Dawkins v. Sappington, *supra*, is quoted from with approval. In Harson v. Pike, 16 Ind. 140, it was decided that it was not necessary that notice should be given to the party offering the reward that his proposal was being acted upon. It is there said that no authority is known for requiring such notice, nor is its effective purpose perceivable. The same question is decided the same way in Hayden v. Souger, 56 Ind. 42, the court saying that notice of the acceptance of the offer was not one of the conditions on which the offered reward was to be paid. See notes to this case as published in 26 Amer. Rep. 1. See, also, Reif v. Paige, 55 Wis. 496, 13 N. W. Rep. 473. In Wentworth v. Day, 3 Metc. (Mass.) 352, it was said: "If the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, either to a particular person, or in general terms to any one who will return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation." In Russell v. Stewart, 44 Vt. 170, it is shown that $500 was offered for the arrest of a murderer. Stewart made the arrest, and it was held that he was entitled to the reward, although he had no knowledge of the offer of a reward when he made the arrest. In Eagle v. Smith, 4 Houst. 293, the action being for a reward offered for a return of lost goods, it was held that the party who had performed the prescribed condition, by finding and returning the goods to the owner, was entitled to recover, although he did not know at the time he returned them that any reward had been offered. In Williams v. Carwardine, 4 Barn. & Adol. 621, it was held that, although the information which was given by the plaintiff, and which led to the discovery and conviction of the murder, was given from other motives than the reward offered, it was the opinion of all the judges that the former was entitled to recover the reward. Denman, C. J., said: "The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought himself within terms of the advertisement, and therefore is entitled to recover." Littledale, J., said: "The advertisement amounts to a general promise to give the sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information." Parke, J., said: "There was a contract with any person who performed the condition mentioned in the advertisement." Patteson, J., said: "I am of the same opinion. We cannot go into the plaintiff's motives." In Society v. Brumfiel, 102 Ind. 146, 1 N. E. Rep. 382, it is stated as an elementary principle that where a party publishes an offer to the world, and before it is withdrawn another acts upon it, the party making the offer is bound to perform his promise. In the same case, the essential difference between a contract by advertisement and an ordinary agreement is stated thus: "In the former case there is no complete contract until performance, while in the latter there is a contract as soon as there is an acceptance of the proposal." It will thus be seen that the liability to pay a reward offered may be placed upon a principle or doctrine somewhat different from that which governs in ordinary contracts.

LIMITING THE RIGHT TO CONTRACT.

1. Introduction.
2. Allowance of Solicitor's Fees in Foreclosure Suits.
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6. Qualifying Promissory Notes.
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8. Gross Weight Law.
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1. *Introduction.*—The line of demarkation between laws which are paternal, and those against public policy, is not always distinctly drawn. Many of the States have endeavored to legislate in favor of the citizen, only to invade one class of rights to-day and another to morrow, by which the complicated machinery of industry is thrown out of gear, thus disturbing the normal adjustment of the social fabric. Corporations and persons whose business implies a trust and public duty should be regulated. The government has, therefore, the power to see that this trust is

not abused, and that the duty imposed by it is properly performed. On this principle, statutes have been declared constitutional, which regulate the charges of railroad companies and other common carriers; elevator, telephone, telegraph and other companies; hackmen, warehousemen, owners of water-mills and the like. A well-intentioned disposition has often been exercised by the State to control the conduct of its citizens, and to shield the weak from the strong in business intercourse. But if the State, without any public necessity, has the power to prohibit the right of contract between private persons in respect to business transactions, then it may prevent the prosecution of all trades, and regulate all contracts, because a question of power does not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.[1]

2. *Allowance of Solicitor's Fees in Foreclosure Suits.*—To begin with the question of solicitor's fees, may not be inappropriate. It is generally held throughout the United States that the mortgagee may contract for a reasonable solicitor's fee in case he has to foreclose the mortgage by suit. This statement needs no citation of authorities. But there are decisions to the contrary. Thus, in Kentucky, an agreement to pay solicitor's fees in the mortgage or note in case of suit to foreclose, is held against public policy, and will not be enforced by the courts, if resisted by the mortgagor.[2] The law in Ohio is similar.[3] And so in Michigan, a stipulation in a mortgage, fixing in advance a gross allowance for solicitor's fees, in the event of foreclosure by suit, is against public policy and cannot be enforced.[4] But the legislature has declared what fees may be allowed by the court,[5] thus saying by implication that the mortgagor is incapable of doing his own business.

3. *Homestead Exemptions cannot be Waived in Advance.*—The law that the right of homestead cannot be waived in advance by contract prior to the issuing of the execution is valid,[6] and it is truly held that the exemption from sale on execution of certain property of a householder rests upon public policy looking to the preservation of families against imprudence or misfortune of their head who cannot by a prospective agreement waive such exemption.[7] Still other courts hold that a prospective waiver is effectual and will be enforced,[8] but this rule is against the weight of authority. Such a law should be sustained, as it is a protection to the family, and, therefore, a benefit to the State.

4. *Stay of Execution.*—Where the statute gives a stay of execution, an agreement of the maker of a note to pay it without relief from the stay laws, does not authorize a judgment of that character;[9] and such a judgment upon a note that prohibits the stay of execution is erroneous.[10]

5. *Agreements not to go into Court.*—It is not within the power of individuals or corporations to create a judicial tribunal for the final conclusive settlement of controversies.[11] The decided weight of authority is against the power of parties to bind themselves in advance, that a controversy that may possibly arise, shall be conclusively settled by an individual or a corporation.[12] The right to sue is one given by law, and no custom can be good which is contrary to law. A custom that a party having a claim for money due upon contract may not pursue the usual remedies provided by law is not valid.[13] In general, parties may, by agreement impose conditions precedent with respect to preliminaries and

[1] Brown v. Maryland, 12 Wheat. (U. S.) 419.

[2] Thomasson v. Townsend, 10 Bush (Ky.), 114.

[3] State v. Taylor, 10 Ohio, 378; Shelton v. Gill, 10 Ohio, 417; Spalding v. Bank, 12 Ohio, 544; Martin v. Trustees, 13 Ohio, 250.

[4] Vosburgh v. Lay, 45 Mich. 455; Bullock v. Taylor, 39 Mich. 137; Myer v. Hart, 40 Mich. 517; Sage v. Riggs, 12 Mich. 313.

[5] Session Laws 1885, art. 133.

[6] Curtis v. O'Brien, 20 Iowa, 376; Morley v. Rogan, 10 Bush (Ky.), 156, 19 Am. Rep. 61; Maxwell v. Reed, 7 Wis. 582.

[7] Kneettle v. Newcomb, 22 N. Y. 249; Maloney v. Newton, 85 Ind. 565; Woodward v. Murray, 18 Johns. (N. Y.) 400; Crawford v. Lockwood, 9 How. Pr. (N. Y.) 547; Harper v. Seal, 10 How. Pr. (N. Y.) 547.

[8] Case v. Denmore, 23 Pa. St. 93; Shelley's Appeal, 36 Pa. St. 373; Bowman v. Swiley, 31 Pa. St. 225.

[9] Develin v. Wood, 2 Ind. 102.

[10] McLean v. Elmer, 4 Ind. 239. This doctrine is similar to the English law that a seaman cannot by contract in advance waive his right to wages. Kay's Ship-master and Seaman, 626.

[11] Austin v. Searing, 16 N. Y. 112.

[12] Kistler v. Indianapolis, etc. Railroad Co., 88 Ind. 460; Bauer v. Sampson Lodge, 102 Ind. 262; Insurance Co. v. Morse, 20 Wall. (U. S.) 445; Wood v. Humphrey, 114 Mass. 185; Mentz v. Insurance Co., 79 Pa. St. 478, 21 Am. Rep. 80.

[13] Manson v. Grand Lodge, 30 Minn. 509; Thompson v. Insurance Co., 104 U. S. 252; Franklin Ins. Co. v. Humphrey, 65 Ind. 549, 32 Am. Rep. 78.

collateral matters, such as do not go to the right of the action; but one cannot be compelled even by his own agreement, mutually to agree upon arbiters, whose duties would go to the root of a particular claim or cause of action, and oust the courts of their jurisdiction.[14] So an agreement that a party will not go into the federal courts, is invalid, because the courts cannot be ousted of their jurisdiction conferred by law.[15] Such an agreement is against public policy.[16] Parties cannot, by contract, bind themselves in advance not to resort to the courts for the redress of wrongs.

6. *Qualifying Promissory Notes.* — It is settled that a promissory note may be qualified, when given by express terms. Thus, it has been held in New York that the provision of the statute which requires that a note or other negotiable instrument, the consideration of which shall consist, in whole or in part, of the right to make, use or vend any patent invention, claimed or represented by the vendor at the time of sale to be patented, shall have the words "given for a patent right," prominently or legibly written or printed on its face, and that such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder,—does not contravene the provisions of the federal constitution; that such provision does not operate as an unlawful restraint upon the right of sale conferred upon the patentee by the act of congress.[17] The right of the inventor to sell his invention is not derived from his patent. His right under his patent excludes others from selling or using his invention. The statute does not in any way interfere with this exclusive right, and is constitutional.[18] Such promissory note, taken by the vendor of a patent right who has not complied with the statute which does not contain the words "given for a patent right," is inoperative as between the parties, and as to one who buys with notice that it was given for such right, unless the latter affirmatively shows that his indorser was a good-faith purchaser.[19] Such omission does not make the note illegal, nor does it take from a *bona fide* transferee for value before maturity, without notice of the consideration, the protection accorded to commercial paper by the law merchant.[20] However, in opposition to this view, decisions are found. The leading case is *Ex parte* Robinson,[21] which holds that a statute of Indiana, making it unlawful for a person to sell, or offer to sell any patent right within that State without first filing an authenticated copy of the letters patent with the clerk of the court, and at the same time making an affidavit before the clerk that the letters patent were genuine and had not been revoked or annulled, and that he had full authority to sell,—is unconstitutional. Because, as Justice Davis, sitting at circuit, said that the law in question was unconstitutional and void, as an infringement upon the right of sale secured to a patentee by the letters patent. Several other cases are founded mainly upon this authority.[22] In speaking of *Ex parte* Robinson,[23] Judge Andrews says, in Herdic v. Raessler:[24] "It will be observed that even if that case was well decided, it would not necessarily determine a case arising under our statute, which does not undertake to impose conditions upon the right to sell a patent invention, but simply prescribes that if a negotiable instrument is taken upon such sale the words 'given for a patent' shall be inserted, and subjects the note to defenses existing against the original holder notwithstanding its transfer."[25] After the decision of Patterson v. Kentucky[26], the Supreme Court of Indiana affirmed the constitutionality of the Indiana statute, reversing its previous decisions to the contrary founded upon *Ex parte* Robinson.[27] And although the statute makes it a crime to take a note in a prohibited transaction, yet it does not make the note in the

[14] Pearl v. Harris, 121 Mass. 390; Dugan v. Thomas, 79 Me. 221; Kill v. Hallester, 1 Wilson, 129.

[15] Nute v. Insurance Co., 6 Gray (Mass.), 174; Cobb v. Insurance Co., 6 Gray (Mass.), 192; Hobbs v. Insurance Co., 56 Me. 421; Insurance Co. v. Morse, 20 Wall. (U. S.) 445.

[16] Doyle v. Insurance Co., 94 U. S. 535.

[17] Herdic v. Raessler, 109 N. Y. 127.

[18] Tod v. Wick, 36 Ohio St. 370; Haskell v. Jones, 86 Pa. St. 173.

[19] New v. Walker, 108 Ind. 365.

[20] Herdic v. Raessler, 109 N. Y. 127.

[21] 2 Biss. C. C. 309.

[22] See Woolen v. Banker, 2 Flipp. 33, U. S. C. C., S. D. Ohio; *In re* Lake, U. S. C. C., N. D. Ohio; Cranson v. Smith, 47 Mich. 309; Wilch v. Phelps, 14 Neb. 134; State v. Lockwood, 43 Wis. 403.

[23] 2 Biss. C. C. 309.

[24] 109 N. Y. 127, 132.

[25] See Patterson v. Kentucky, 97 U. S. 501, 503, 506.

[26] 97 U. S. 501.

[27] See Breckhill v. Randall, 102 Ind. 528, 52 Am. Rep. 695; New v. Walker, 109 Ind. 365.

hands of an innocent purchaser, void, notwithstanding the person who violated the statute committed a crime.[28]

7. *Prohibiting Employees from Making Contracts.*—Several States have passed laws prohibiting employees from making contracts in advance to accept anything else than lawful money of the United States.[29] The Indiana statute was held constitutional. It was enacted to prevent the corporations from paying their employees in merchandise and compel them to pay their employees every two weeks. Judge Elliott, in passing upon this statute said that "we cannot conceive a case in which the assertion of the legislative power to regulate contracts has a sounder foundation than it has in this instance, for here the regulation consists in prohibiting men from contracting in advance to accept payment in something other than the lawful money of the country for the wages they may earn in the future. It is of the deepest and gravest importance to the government that it should unyieldingly maintain the right to protect the money which it makes the standard of value throughout the country. The surrender of this right might put in peril the existence of the nation itself."[30] The force of this argument is not apparent. While the federal government has the right to make the standard of value and protect its money, it has no authority to say what one citizen of Indiana shall pay for services rendered by another citizen of that State. If the employee agrees to take twenty yards of calico for a day's work, the federal government cannot interfere; and the right of the State to interfere in such case is questionable.

The Illinois act says that "nothing in this act shall be so construed as to exclude the business of farmers, or farm laborers, or servants."[31] But the weight of authority is against the Indiana decision. The West Virginia Court of Appeals has declared such a law unconstitutional.[32] Presiding Judge Snyder says that it is not competent for the legislature to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall be bound by laws not imposed upon other owners of property or employers of labor, which prohibit them from making contracts which it is competent for other owners of property or employers of labor to make; that such legislation cannot be sustained as an exercise of the police power. To use his language: "It is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile." So, in Pennsylvania such a law has been declared void, because it is an attempt by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts.[33] The act is an infringement alike of the rights of the employer and employee. The court says: "More than this it is an insulting attempt to put the laborer under a legislative tutilage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." Such a statute attempts to do for private citizens, under no disability of body or mind, what they can best do for themselves. It selects miners, and corporations and manufacturers as a class, and denies to them privileges which concern private affairs solely, and which are enjoyed by all other clases of citizens. Of course the law would be constitutional if applied to persons and corporations engaged in occupations in which the public has an interest or use; these may be regulated by statute, because the public has a use in these occupations, and the persons engaged in them are in the exercise of a public franchise, or special privileges, not enjoyed

[28] Cook v. Wierman, 51 Iowa, 561; Palmer v. Winar, 8 Hun (N. Y.), 342; Glenn v. Farmers' Bank, 70 N. Car. 191; Smith v. Columbus State Bank, 9 Neb. 342; Taylor v. Beck, 3 Rand. (Va.) 316; Haskell v. Jones, 86 Pa. St. 173; New v. Walker, 108 Ind. 365; Vallett v. Parker, 6 Wend. (N. Y.) 615.

[29] Indiana, Elliott's Supp., §§ 1599, 1610; Illinois, Laws 1881, p. 212; West Virginia, Code 1887, p. 983; Acts of 1887, ch. 63, sec. 3; Pennsylvania, Laws of 1881, p. 147.

[30] Hancock v. Yaden, 121 Ind. 366; 30 Cent. L. J. 192.

[31] Laws of 1891, p. 213, sec. 6.

[32] State v. Goodwill, 33 W. Va. 179. And see Commonwealth v. Perry (Mass.), 34 Cent. L. J. 78.

[33] Godcharles v. Wigeman, 113 Pa. St. 431.

by others not so engaged. Their business implies a trust and public duty. The State has, therefore, the power to see that this trust is not abused, and that the duty imposed by it is properly performed.[34] It is believed that no case except Hancock v. Yaden,[35] can be found which has upheld a statute which has undertaken to regulate the dealings between employer and employee, much less in cases not impressed with a public trust.

8. *Gross Weight Law.*—The Colorado Supreme Court has declared an act unconstitutional, which provides for the weighing of coal at mines, in the condition in which it is hoisted from the mine, and for payment to the miner upon the basis of such weight. This law would include the weight of the screenings, which coal owners generally deduct.[36] The legislature of Illinois passed a similar law last session.[37] Whether this law is constitutional has not yet been decided. But the Illinois Supreme Court has held unconstitutional, a statute which required the owners or operators of mines to provide scales for weighing their coal, and making the weight of coal the basis of the wages of miners. It was held void because it is not competent for the legislature, under the constitution, to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make; that such legislation is not an exercise of the police power.[38] Class legislation is unconstitutional and void, because it is an unjust interference with private contracts and business. Each individual has the right to use his faculties in all lawful pursuits, to live and work where he will, to earn his livelihood in any lawful vocation, and to follow any lawful trade, unrestricted by class legislation.

9. *Conclusion.*—The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes, is depriving him of his property, under the provisons of the constitution.[39] Of course laws against public policy are invalid, and persons may be controlled under the police power of the State. But this power is not above the constitution, which is the supreme law, and, so far as the same imposes restrictions, the police power must be exercised in subordination to it.[40] So a law which prohibits persons and corporations, engaged in mining and manufacturing, and interested in selling merchandise and supplies to their employees at a greater per cent. of profit than they sell to others not employed by them, is unconstitutional and void, because it is class legislation and an unjust interference with private contracts and business.[41] In this case the court say: "In condemning this statute we do not wish to give countenance to the idea that any employer, whether he be engaged in mining, manufacturing or any other business, has the right to discriminate against his employees, by selling to them goods or supplies, under similar circumstances, at a greater per cent. of profit than he does to his other customers. Such a discrimination is not only unjust, but it is subversive of the first principle of trade, and no employee should buy from such employer. The remedy is in the hands of the employee. He is not compelled to buy from his employer; and the general law, without any special statute, will fully protect him in his refusal to do so. The ground on which this act is condemned is that it is class legislation, and an unjust interference with rights, privileges and property of both employee and employer, and places upon both the badge of slavery, by denying to the one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself, or manage his own private affairs. Every person living under the protection of our government has the right to adopt and follow any lawful pursuit not injurious to the community. He has the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence,

[34] Munn v. People, 69 Ill. 80; Munn v. Illinois, 94 U. S. 113; People v. Budd, 117 N. Y. 1.

[35] 121 Ind. 366.

[36] 33 Cent. L. J. 237; *In re* House Bill No. 10, 26 Pac. Rep. 824.

[37] Laws of 1891, p. 170.

[38] Millet v. People, 117 Ill. 294.

[39] People v. Otis, 90 N. Y. 48; Commonwealth v. Perry (Mass.), 34 Cent. L. J. 78.

[40] *In re* Jacobs, 98 N. Y. 98; Mugler v. Kansas, 123 U. S. 623.

[41] State v. Coal & Coke Co., 33 W. Va. 188, 6 L. A. R. 369.

and to inherit, purchase, lease, sell and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression."[42]

D. H. PINGREY.

Bloomington, Illinois.

[42] Yick Wo v. Hopkins, 118 U. S. 356; Ragio v. State, 86 Tenn. 272; State v. Devine, 98 N. Car. 778; People v. Max, 99 N. Y. 377; State v. Goodwill, 33 W. Va. 179; *Ex parte* Westerfield, 55 Cal. 550; Slaughter House Cases, 16 Wall. (U. S.) 36; Butchers' Union Co. v. Crescent City, etc. Co., 111 U. S. 746, 6 Myer's Fed. Dec., sec. 1000; People v. Gillson, 109 N. Y. 398; Association v. Crescent Co., 1 Abb. (U. S.) 398. As to restrictions on insurance contracts, see Riley v. Insurance Co., 43 Wis. 449; Queen's Ins. Co. v. Leslie (Ohio), 24 N. E. Rep. 1072; Equitable Ins. Co. v. Clements, 140 U. S. 226; Insurance Co. v. Currie, 13 Bush (Ky.), 313. As to the restriction imposed on the sale of oleomargarine, see Powell v. Pennsylvania, 127 U. S. 678; Pennsylvania v. Powell, 114 Pa. St. 268; State v. Newton (N. J.), 14 Atl. Rep. 605; State v. Marshall, 64 N. H. 549; Pure v. State, 68 Md. 592; People v. Arensbury, 105 N. Y. 123.

EXPRESS COMPANY — LIMITING LIABILITY FOR LOSS.

BALLOU V. EARLE.

Supreme Court of Rhode Island, July 25, 1891.

The giving by an express company, and the acceptance by a shipper, of a printed receipt valuing a package received for transportation at $50, and limiting the liability of the company for loss to that amount, unless the value was otherwise therein expressed, is, in the absence of an expression of greater value, a valid agreement as to the extent of the company's liability where the package was lost through the negligence of the company.

TILLINGHAST, J.: This is assumpsit to recover the sum of $579, being the value of a box of diamonds which the plaintiff delivered to the servant an agent of the defendants to be by them transported by express to New Bedford, in the State of Massachusetts. Jury trial is waived, and the case is to be tried to the court on the law and the facts. The defendants, who are common carriers of merchandise for hire, received from the plaintiff at Providence, on the 26th day of July, 1890, a package containing diamonds of the value aforesaid, to be by them delivered to C. W. Haskins, at New Bedford, Mass. The plaintiff had, and for a considerable time previous to the above-named date had had, in his possession and constant use in a book of the defendants' contract receipt blanks, at the top of each page of which was printed what purports to be a mutual agreement between the shipper and common carrier, which agreement, in so far as it is material for our present consideration, provides that the defendants "are not to be held liable or responsible for any loss or damage to said property * * * unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company, or their servants; nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed or unless especially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of Earle & Prew's Express." One of these blanks the plaintiff filled out for the addressed package in question, but gave no value thereof, although there was a blank column in said receipt marked "value." This receipt was signed by the defendants' agent when the plaintiff gave the package to the agent. The defendants had no knowledge of the contents or value of said package as stated in said receipt at the time of its delivery to them, nor did they make any inquiry of the plaintiff concerning the same. This package was lost by the negligence of the defendants' servant before it reached their office, and said defendants admit their liability therefor under said agreement, and offer to pay the said sum of $50, which, they contend, is the limit of their liability. The plaintiff testifies that his reason for not giving any value to the package was because the expressage was to be paid by the consignee. The defendants, on the other hand, testify that the reasons given them by the plaintiff for not giving any value to the package in said receipt were that it cost more money, and that the consignee had previously complained of the charges of expressage in cases where the values had been given, and that he adopted this mode to lessen said charges.

We think it is very evident that the purpose of the plaintiff in not giving any value to the package was to save, either to himself or to the consignee, and it matters not which, the additional expressage which would have been charged by the defendants if the real value had been given; for it must be presumed from the terms of the receipt that, as the defendants assume a liability only to the extent of the valuation therein named, the rate of expressage is graduated by said valuation. Under this state of facts the plaintiff's final contention, which logically should be the first, and hence we will consider it first, is that the express assent of the owner of the goods to the restrictions of the carrier's liability must be found to give effect to it in any case. We think the decided preponderance of the authorities is to the contrary; and that the well-settled rule now is that in the absence of fraud, concealment, or improper practice the legal presumption is that stipulations limiting the common-law liability of common carriers contained in a receipt given by them for freight were known and assented to by the party receiving it. Belger v. Dinsmore, 51 N. Y. 166; Steers v. Steamship Co., 57 N. Y. 1; Harris v. Railway Co., 1 Q. B. Div. 515; Germania Fire Ins. Co. v. Memphis & C. R. Co., 72 N. Y. 90; Quimby v. Railroad

Co., 150 Mass. 365, 23 N. E. Rep. 205; Burke v. Railway Co., 5 C. P. Div. 1; Maghee v. Railroad Co., 45 N. Y. 514; Grace v. Adams, 100 Mass. 505; Insurance Co. v. Buffum, 115 Mass. 343; Hill v. Railroad Co., 73 N. Y. 351. For a full discussion of the contrary doctrine, see Hollister v. Nowlen, 19 Wend. 234, and cases cited. In the case at bar a printed *fac-simile* of the receipt in question is before us, which shows that the terms and conditions upon which the defendants received the goods in question must have been well known to the plaintiff. And more especially is this to be taken for granted from the fact that a book of the defendants, filled with receipt blanks identical with this, was in the plaintiff's possession, and in almost daily use by him. From an examination of said *fac-simile* it is evident that there was not only no attempt to conceal the terms and conditions of the bailment on the part of the defendants, but, on the other hand, that it had been their purpose to make the same specially prominent and noticeable. It is all printed on one side of the paper, and at the top thereof. It is headed by the caution, printed in bold type, "Read the Conditions of this Receipt," and all the printed matter precedes the signature of the agent of the defendants. We think, therefore, that the receipt in question ought to be regarded as having received the assent of the plaintiff, and as being, as its language purports, the mutual agreement of the parties touching the package in question.

Having found, then, that there was an agreement between the parties as to the limit of the defendants' liability in case of loss, we come to the main question in the case, viz., was said agreement valid and binding upon the parties thereto? or, to state the question more broadly, to what extent is a common carrier entitled to contract in limitation of his common-law liability? This is a question, in so far as it applies to carriers by land, upon which there has been great contrariety of opinion in different courts, the earlier cases holding that it was against public policy, and hence impossible, for common carriers to guard themselves by any stipulations whatever against liability from loss arising from any other cause than the act of God or the public enemy. This question is discussed in Edwards on Bailments (section 552, and cases cited in note 5), while the later cases have materially modified this rule in the carrier's favor, and permitted him not only to contract so as to change the extent of his liability as fixed by the common law, but such contracts, when made with his employer, became almost entirely the measure of his responsibility. "And this custom," says Hutchinson on Carriers, (section 119), "has become so universal in transactions with carriers that his liability may now be said to depend almost exclusively upon contract. He still stands, however, in the relation of common carrier to the goods intrusted to him, notwithstanding his contract, however much it may lessen his common-law liability, and he cannot, even by the most express contract, divest himself of that character, and change it to that of a mere private carrier or ordinary bailee." Davidson v. Graham, 2 Ohio St. 131, 140; Railroad Co. v. Lockwood, 17 Wall. 357; Hooper v. Wells, 27 Cal. 11; Christenson v. Express Co., 15 Minn. 270, (Gil. 208); Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, 180; Kirby v. Express Co., 2 Mo. App. 369; but see Express Co. v. Sands, 55 Pa. St. 140; Grogan v. Express Co., 114 Pa. St. 523, 7 Atl. Rep. 134. Without attempting a review of the conflicting authorities upon the question before us, which would answer no useful purpose here, we will only say that upon an examination thereof we have come to the conclusion that the decided weight of the authorities, as well as the better reason, favors the rule that a common carrier may, to a great extent at least, contract in limitation of his common-law liability, "provided," as stated in Express Co. v. Caldwell, 21 Wall. 264, "the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy." The shipper and the common carrier are thus authorized to enter into an express agreement, within certain limits, as to the terms upon which the latter will transport and convey for the former a certain article of personal property of an agreed value to a designated place for an agreed price. We fail to see that the recognition of the validity of such an agreement is violative of any sound rule of public policy. Indeed, it seems to us that public policy requires the upholding of such an agreement as tending to the honest disclosure of value on the part of the shipper, and the exercise of that degree of diligence on the part of the carrier which is commensurate with the value of the particular article conveyed, and the price paid for such conveyance. To illustrate: A has a box of tinware of the value of five dollars, which he wishes to send to Boston by B, a common carrier. The box is delivered to B under an agreement similar to the one before us, no information being given as to the contents of said box. What is the degree of care which B is expected to exercise in the transportation of this box? Manifestly that degree of care which is commensurate with a box whose value does not exceed that stipulated in the contract, to-wit, $50. B's maximum liability in case of loss being known to him beforehand, he will naturally exercise such a degree of care as would ordinarily insure the safe delivery at its destination of an article of this value. Moreover, he is only paid for assuming a risk to the extent of $50, and he has graduated his charge for carriage accordingly. Such an agreement certainly strikes one as eminently fair and reasonable. Neither party is deceived or misled thereby. The shipper on the one hand is insured of the safe delivery of his goods at their destination, or their value in money, in case of loss, and the carrier, on the other hand, proportions his care to the liability of which he has assumed. Both parties thus act understandingly and intelligently. There is little opportunity for fraud on the part of the shipper, and none for overcharge on the part

of the carrier. To illustrate again: A wishes to send a box of diamonds, valued at $500, to Boston, Mass., and employees B, a common carrier, to transport the same thence under an express agreement which stipulates, among other things, that the value thereof is $50, the charge for expressage being based upon that valuation. As in the former case, B assumes, and has the right to assume, that the value of this package does not exceed the sum of $50, and he therefore proportions his care accordingly. The package is lost by B, whereupon A seeks to hold him liable for the actual value of said package, which was many times larger than that agreed upon. B was only paid for the care and transportation of a package of the value of $50, and the degree of care which he used was sufficient for a transaction of that sort, while it was quite insufficient for a transaction of the sort which he was induced by misrepresentation on the part of A to undertake. Had he been apprised of the actual value of this package, he would have exercised that degree of care which was commensurate therewith, and would also have graduated his charge accordingly. To allow A to repudiate his contract with B in case of loss, and hold the latter to his strict common-law liability, under the circumstances, is little less than to permit him to perpetrate a fraud under the guise of enforcing a legal right.

If this illustration fairly represents the case at bar, and it seems to us that it does, it shows the unreasonableness and injustice of the rule of liability contended for by the plaintiff. But the main contention of the plaintiff is that an express company cannot limit its liability for loss of goods occasioned by its own negligence, and in support thereof he cites the following cases, viz.: Grogan v. Express Co., 114 Pa. St. 523, 7 Atl. Rep. 134; Brown v. Express Co., 15 W. Va. 812; Maslin v. Railroad Co., 14 W. Va. 180, 191; Newborn v. Just, 2 Car. & P. 76; New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. 344; Snider v. Express Co., 63 Mo. 376, 383; Express Co. v. Graham, 26 Ohio St. 595, 598; Railroad Co. v. Hale, 6 Mich. 243; Transportation Co. v. Newhall, 24 Ill. 466; Graham v. Davis, 4 Ohio St. 362; Muser v. Express Co., 1 Fed. Rep. 382; Express Co. v. Seide (Miss.), 7 South. Rep. 547. These cases undoubtedly sustain the position of the plaintiff in this respect; and we are not only not disposed to question their authority upon this point, but to agree entirely therewith. We do not think that it is competent for a common carrier to stipulate for exemption from loss occasioned by his own negligence or that of his servants. Such an exemption is not just and reasonable in the eye of the law. Nor is it necessary for us to so hold in order to sustain the contract under consideration; for, as stated by Blatchford, J., in Hart v. Railroad Co., 112 U. S. 331, 340, 5 Sup. Ct. Rep. 151, "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carriers the measure of care due to the value agreed on. The carrier is bound to respond in that value for any negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." The case from which we have thus quoted was one in which the loss happened from the negligence of the defendant. The court had previously declared in the same case (page 338) that "it is the law of this court that a common carrier may by special contract limit his common-law liability; but he cannot stipulate for exemption from the consequences of his own negligence, or that of his servants," thus expressly affirming the doctrine previously laid down by that learned court in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; York Manuf'g Co. v. Illinois Central R. Co., 3 Wall. 107; Railroad Co. v. Lockwood, 17 Wall. 357; Express Co. v. Caldwell, 21 Wall. 264; Railroad Co. v. Pratt, 22 Wall. 123; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Railroad Co. v. Stevens, 95 U. S. 655. But although the loss did occur from the negligence of the defendant, the court upheld the agreement as to the value of the property on the ground, as forcibly stated in the opinion, that there is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occured through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. "The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract." The rule laid down in Grogan v. Express Co., 114 Pa. St. 523, 7 Atl. Rep. 134, a case much relied on by the plaintiff, that "an express company cannot by special contract or special acceptance limit its liability for loss of goods, resulting from the negligence of the company or its servants," is not in conflict with the case just quoted from upon this point, and, with all due respect to the learned court which rendered this decision, we think that

it misapprehended the decision in Hart v. Railroad Co., *supra*, in declaring that the case had decided that a common carrier could limit its liability even as against its own negligence. The real distinction between these two cases, as it seems to us, is not in the rule adopted by each, but in the application thereof. In the Grogan Case the court holds that an agreement as to value in case of loss by negligence is not binding on the parties, on the ground, as we understand the decision, that to hold the contrary would be to uphold the carrier in stipulating against his own negligence, although it holds at the same time than an agreement as to value "would be a protection against liability beyond that amount except for negligence." In this respect the court followed the case of Express Co. v. Sands, 55 Pa. St. 140, and Farnham v. Railroad Co., *Id.* 53; that is to say, these cases hold that an agreement as to value in case of loss is valid and binding, excepting only where the loss is occasioned by the negligence of the common carrier or his servant; while in the Hart Case, before referred to, the court holds that the agreement as to value is also valid and binding where the loss is occasioned by the negligence of the common carrier, and that so to hold "has no tendency to exempt from liability for negligence." The reasoning in the last named case is cogent and convincing, and we are disposed to adopt the same in preference to the authorities which hold to the contrary. See, also, Oppenheimer v. Express Co., 69 Ill. 62; Kallman v. Express Co., 3 Kan. 205; Brehme v. Express Co., 25 Md. 328; Snyder v. Express Co., 63 Mo. 376; Levy v. Express Co., 4 S. C. 234; Boorman v. Express Co., 21 Wis. 154. We therefore decide that it was competent for the parties to agree as to the value of the package in question in case of loss by negligence, and that, having thus agreed, they are bound thereby. Judgment must therefore be entered for the plaintiff for the sum of $50.

NOTE.—The exhaustive character of the opinion in this case renders unnecessary a review at length of the authorities upon the questions presented. An express company may, in accordance with the great current of authorities concerning common carriers, limit by contract its extreme common law liability as an insurer, by stipulations in a bill of lading or similar document, against responsibility for loss or damage arising from particular causes not due to the fraud or gross negligence of the company or its servants, or similarly limit its liability as to the value of the property, or by regulations as to the manner of delivery and entry of packages, information of their contents, etc. Adams Express Co. v. Fendrick, 38 Ind. 150; Olwell v. Adams Express Co., 1 Cent. L. J. 186; Brehme v. Adams Express Co., 25 Md. 328; Oppenheimer v. United States Express Co., 69 Ill. 62; Kallman v. United States Express Co., 3 Kan. 205; Boorman v. American Express Co., 15 Minn. 270. As to limitation of recoverable value, see Kirby v. Adams Express Co., 2 Mo. App. 369; United States Express Co. v. Backman, 28 Ohio St. 144; Southern Express Co. v. Crook, 44 Ala. 468; Orndorff v. Adams Express Co., 3 Bush, 194. Concerning common carriers' limitation of liability in general, see McFadden v. Pacific Ry. Co., 92 Mo. 343, S. C., 1 Am. St. Rep. 721, and note leading to the important cases and their discussion, 728. And the general rule is that where the value of the goods is stated in the contract, in case of loss other than from negligence, the value to be recovered is that fixed in the bill of lading or contract by parties, even though goods are of greater value. 7 Am. & Eng. Ency. of Law, page 549, citing United States Express Co. v. Backman, *supra;* Kirby v. Adams Express Co., *supra;* Munser v. Holland, 17 Blatchf. (U. S. C. C.) 412; Magnin v. Dinsmore, 62 N. Y. 35. It is well settled that an express company cannot by special contract limit its liability for negligence or misconduct. Southern Express Co. v. Hunnicutt, 54 Miss. 566; Boscowitz v. Adams Express Co., 93 U. S. 174. Though it seems that in New York a company may thus limit its liability, provided the contract be clear and unmistakable in terms. 7 Am. & Eng. Ency of Law, page 550; Cragin v. N. Y. Cent. R. R., 51 N. Y. 61; Condiet v. Grand Trunk R. Co., 54 N. Y. 500; Nicholas v. N. Y. Cent. & H. R. Co., 89 N. Y. 370.

In West Virginia, the rule of limitation is peculiar to that State, and extends to all degrees of negligence short of fraud. Baltimore R. Co. v. Rathbone, 1 W. Va. 87.

By statute in England, the carrier cannot limit his liability by notice, but must, if he desires to limit his liability, enter into a special contract in writing, which must be signed by the owner or sender of the goods, and even then the limitation must be, in the opinion of the court or judge, "just and reasonable." Hodgman v. Western Midland R. Co., 6 B. & S. 560; Peck v. North Staffordshire R. Co., 10 H. L. Cas. 472. In this country it is said to be "well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given him of their contents, the rates of freight and the like. As for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such and paid accordingly." 2 Greenl. on Evidence, § 215.

The limitations and provisions usually found in receipts, may be said to be offers or proposals for contracts, and generally they must be assented to before they are contracts. Farmers' Bank v. Champlain Transp. Co., 23 Vt. 186; Little v. Boston R. Co., 66 Me. 239; Mobile R. R. v. Weiner, 49 Miss. 725. Hence it is important to know what is equivalent to the assent of the consignor. An assent to the notice by the consignor is equivalent to an express contract. Blumenthal v. Brainerd, 38 Vt. 402; United States Express Co. v. Haines, 67 Ill. 137. It has been held that the mere fact of having seen the notice is not an assent to it. Buckman v. Adams Express Co., 97 Mass. 124; Moses v. Boston R. R. Co., 24 N. H. 71. But taking a receipt containing words of limitation of liability without dissent by the consignor is evidence of assent to its terms. Steele v. Townsend, 34 Ala. 247; Lake v. Hurd, 38 Conn. 536; Robinson v. Merchants' Dispatch Transp. Co., 45 Iowa, 470; Adams Express Co. v. Sharpless, 77 Pa. St. 516; Boorman v. American Express Co., 21 Wis. 152, the presumption being that the consignor reads the receipt. Hoadley v. Northern Transp. Co., 115 Mass. 304; Kirkland v. Dinsmore, 62 N. Y. 171.

In the principal case, the plaintiff contended that his express assent to the restricted liability must be shown, but the court held that in the absence of fraud, concealment or improper practices his assent

would be presumed, citing a number of cases and calling attention to Hollister v. Nowlen, 19 Wend. 234, where the contrary doctrine is maintained. The *Railway and Corporation Law Journal*, in commenting hereon, calls attention to the failure of the court to cite a New England case, Farmers', etc. Bank v. Champlain Transp. Co., 23 Vt. 186, where it is held that the express assent of the shipper must be proved. So also in Erie, etc. Transp. Co. v. Dater, 91 Ill. 195, it is held that the acceptance of such a receipt by the shipper and his previous practice in accepting such receipts is some evidence, but not conclusive, that the limitation of liability was known to and accepted by him.

CORRESPONDENCE.

LEGISLATIVE POWER TO ABOLISH GRAND JURY.

To the Editor of the Central Law Journal:

In 34 Cent. L. J. 53, Mr. A. A. Kemble, in criticising the case of *In re* Wright, 27 Pac. Rep. 565, raises the question whether the State of Wyoming, under the limitation of the 5th amendment of the federal constitution, had the power to abolish the grand jury system. Your correspondent comes to the conclusion that "there seems to be no room to doubt that the limitation applies to the States as well as to the United States government." But in the case of Barron v. Baltimore, 7 Pet. 243, it was expressly adjudicated that one of the other inhibitions found in the same amendment was a limitation upon the power of the United States only, and not upon the power of the several States. Marshall, who gave the opinion of the court, laid down the rule that "no limitation of the action of government on the people would apply to the State government, unless expressed in terms." As the 5th amendment does not contain in any of its provisions any limitation in express terms upon the power of the several States, there seems to be no room to doubt that the limitation does not apply to the States but only to the United States government, and that a State may, unless prohibited by its own constitution, abolish the grand jury system, and may in cases of felony proceed on information instead.

W. W. QUARTERMASS.

Oshkosh, Wis.

BOOK REVIEWS.

SEDGWICK ON MEASURE OF DAMAGES.

The first edition of this treatise appeared in 1847, in a single volume of six hundred pages, in which some fifteen hundred cases were cited. Failing health prevented the author from continuing the work of revision begun in the second edition, and his death in 1859 made it necessary that it should be taken up by other hands. Since that period several annotated editions have appeared, but this edition, which is the eighth, is the first since the author's death where there has been an attempt to make the arrangement of the work systematic and in accordance with what the author had in mind to execute. The present edition is the result of the joint labors of Arthur G. Sedgwick and Joseph H. Beale, Jr., both of whom are well qualified for the task. In its preparation the whole work has been revised, rearranged and enlarged. The authors say that in writing the new text, "it was found that the growth of the law in different fields was very unequal and, of course, most attention has been given to those in which there has been the greatest accumulation of new cases. In real property, for instance, the somewhat rigid rules of compensation have not undergone much modification, and in the common kinds of actions of tort there is no great growth. On the other hand, if we examine the subject of contracts, we shall find a continual change and development. Since the last edition, the courts have adopted a tolerably uniform view of the rules in Hadley v. Baxendale, while they have greatly developed the law relating to contracts for the carriage of passengers, and to telegraphs. The doctrine of avoidable consequences, originally of such slight importance as to need little more than a bare mention, has been so expanded and applied in so many different classes of cases as to require very full treatment." It would be quite impossible, within the limits of this notice, to give even an outline of the chapters in the three bulky volumes. It is sufficient to say that the general plan of the work, as it at present stands, is as follows: In the first volume are given the general principles which govern the rules of compensation in all cases. The second volume embraces all the particular classes of personal actions and actions relating to personal property, whether sounding in contract or tort. The third treats of real property, recoupment, statutory damages, pleading, practice, evidence, special damages, and the relations of court and jury.

A careful examination of the work satisfies us of its great merit, and we do not hesitate to say that as a modern treatise on the subject of which it treats, it is unexcelled. The labors of the editors seem to have been performed with great diligence and care, and with a conscientious regard for the reputation of the work, and that of its original projector.

The text is clear, concise and philosophic in style, and the notes are copious and exhaustive of the authorities. The mechanical execution of the work is good, the type and printing being especially noteworthy. It is published by Baker, Voorhis & Co., New York.

LAWYERS' REPORTS ANNOTATED, Book 11.

As each volume of this excellent series of reports makes its appearance we are the more impressed with their great value to the practitioner. We have heretofore pointed out the many striking features of the volumes, and it would be impossible, in calling attention to the one before us, to single out and make special mention of the many well selected cases and exhaustive notes to be found within the compass of its one thousand pages. Suffice it to say that it contains the cream of cases decided during the period it covers, and that the notes furnished by Mr. Desty could not be excelled in accuracy and exhaustiveness.

QUERIES ANSWERED.

ANSWER TO QUERY NO. 1.

[*To be found in Vol. 34, Cent. L. J. p. 53.*]

In reply to query No. 1 by "C," in your issue of Jan. 15th inst., it can be said that he does not state the circumstances under which the injury occurred, and hence it cannot be judged whether the railroad company would or would not be liable for the injuries which A sustained. It is evident, however, that the point to which C directs attention is whether the cir-

cumstances under which A went to work were such as to entitle him to be treated and considered as an employee of the railroad company. Upon this question the case of Georgia Pacific Railway Co. v. Propst, 83 Ala. 518, S. C., 85 Ala. 203, S. C., 90 Ala. 1, is directly in point. On the last appeal (90 Ala. 1), a judgment for the plaintiff was affirmed. The decision, as reported in 83 Ala., was by Stone, C. J., who at page 525 says: "The conductor testified that he had no authority * * * to engage the services of the plaintiff in the capacity of brakeman. Express authority for this purpose was not necessary. The circumstances themselves, about which there is no conflict of testimony, gave him the authority. In such an emergency there must be discretion and authority somewhere to supply the place of disabled or missing servants; and no one could exercise this power so well or so prudently as the conductor in charge of the train. We will, therefore, treat the plaintiff as the lawfully employed servant of the company." If there were no conductor, the same principle would, I think, apply to any other servant of the company who had been placed in charge to control or supervise the particular work.

S. D. WEAKLEY.

Birmingham, Ala.

HUMORS OF THE LAW.

CURIOUS CORONERS' VERDICTS.

"By taking with his own hands an overdose of morphine."

"From causes unknown to the jury and having no medical attendance."

"Came to his death from national causes."

"An inquisition holden upon the body of John Brown there lying dead by the jurors whose names are hereto subscribed, who upon theire oath do say that he came to his death in the following manner, by falling off the plank bridge accidental while trying to cross the stream and was drowned."

"Said child one day old, came to her death from spasms, said child having been found by the witness in a trunk, under very suspicious circumstances."

"The joueres on thare ouathe do say that he come to deth by old age, as tha could not see ennything else the matter."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Sales of Land.—Code Civil Proc. § 1561, providing that in sales of property by and executor under authority given in the will no title shall pass unless the sale is confirmed by the court, does not apply to sales under a will directing that "all the property of which I die the owner vests absolutely in my executor, said executor to hold said property in trust for the uses and purposes in this will mentioned," and giving the executor power to sell any portion of the estate that may seem proper to him.—*In re Williams' Estate*, Cal., 28 Pac. Rep. 227.

2. ADVERSE POSSESSION—Title.—Where one through mistake takes possession under a deed of more land than it conveys, he may, notwithstanding, begin later an adverse occupancy of the excess.—*Mather v. Walsh*, Mo., 17 S. W. Rep. 755.

3. APPEAL—Assignment of Errors.—A petition in error in the supreme court may be amended more than one year after the ruling of the district court complained of has taken place, if the amendment is only to make good a defective, informal, or incomplete allegation of error already contained in the petition in error; but when the proposed amendment sets forth an absolutely new and distinct allegation of error or cause for reversal, it cannot be made after that time.—*Cogshall v. Spurry*, Kan., 28 Pac. Rep. 154.

4. APPEAL—Harmless Error.—Where the complaint in an action to recover for services rendered contains two counts, the first being on a special contract and the second on a *quantum meruit*, and the verdict is on the first count only, evidence under the second count as to what is the customary price for the kind of services alleged to have been performed, even if improperly admitted, will not work a reversal, since it could not have influenced the verdict.—*Barnett v. Glutting*, Ind., 29 N. E. Rep. 154.

5. APPEAL—Jurisdictional Amount.—Under Const. Mo. 1875, art. 6, § 12, a case does not fall within the jurisdiction of the supreme court because of the "amount in dispute," unless the record in the trial court shows that the amount exceeds $2,500.—*State v. Gill*, Mo., 17 S. W. Rep. 758.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—A debtor in failing circumstances, engaged in making a general assignment of his property for the benefit of all his creditors, cannot at the same time make a valid preferences of certain of his creditors by chattel mortgages or otherwise.—*Wyeth Hardware Co. v. Standard Implement Co.*, Kan., 28 Pac. Rep. 171.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—An insolvent debtor gave to his son a bill of sale of the greater part of his estate, and the next day made a general assignment for the benefit of his creditors. The consideration of the bill of sale was a debt due from the insolvent to his son, and the latter's assumption of certain other debts due from the insolvent. The son, when he received the bill of sale, had no knowledge that the insolvent had any intention of making an assignment: *Held*, that the bill of sale did not constitute an unlawful preference, within the meaning of the Laws N. Y. 1887, ch. 503.—*Manning v. Beck*, N. Y., 29 N. E. Rep. 90.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—Mansf. Dig. Ark. § 305, provides that before an assignee

for the benefit of creditors shall be entitled to take possession of or in anywise control the assigned property he shall file a complete inventory of the property, and a bond in double its estimated value: *Held*, that a provision in the deed of assignment that the assignee shall not take possession until he files the required bond is surplusage, and will not be construed as authorizing him to take possession before he files an inventory, in violation of the terms of the statute.—*Sanger v. Flow*, U. S. C. C. App., 48 Fed. Rep. 152.

9. ASSOCIATIONS—Constitution—Forfeiture.—The constitution and by-laws of the Knights of Labor, providing that, on suspension of a local assembly, its property shall be forfeited, and vest in the secretary of the general assembly, are void, in that they seek to confiscate, without judicial process, property which is not derived from the general assembly, but is held and owned by the local assembly absolutely. — *Wicks v. Monihan*, N. Y., 29 N. E. Rep. 139.

10. ASSUMPSIT — Pleading.— Issue was joined on the plea of *non assumpsit*. Defendent then filed two special pleas, to which plaintiff demurred. The court overruled the demurrers, and gave final judgment for the plaintiff: *Held*, this was the error, as there should have been no final judgment without the issue on the plea of *non assumpsit* having been tried, withdrawn, or otherwise disposed of.—*Morgantown Bank v. Foster*, W. Va., 13 S. E. Rep. 996.

11. ATTACHMENT — Chattel Mortgagor. — A creditor holding a chattel mortgage, as security for his debt, upon property belonging to the debtor, can maintain an attachment against the same and other property of the debtor.—*State Bank v. Mottin*, Kan., 28 Pac. Rep. 200.

12. ATTACHMENT — Exemptions. — Where an attachment debtor files with the officer making the levy a verified claim to exemption, but fails to make an inventory of all his personal property, money, etc., as required by Code 1886, §§ 2521, 2525, plaintiffs, by proceeding to contest the exemption without objecting, waive the insufficiency of the claim of exemption.—*Trager v. Feebleman*, Ala., 10 South. Rep. 213.

13. ATTORNEY'S LIEN.—In South Carolina an attorney's lien is limited to his disbursements and the costs taxed; and therefore a federal court sitting in that State cannot declare a lien on the fruits of its judgment for services rendered in the State courts in litigation concerning the same subject-matter.—*Massachusetts & Southern Const. Co. v. Township of Gill's Creek*, U. S. C. C. (S. Car.), 48 Fed. Rep. 145.

14. BANKRUPTCY.—Where an assignee in bankruptcy applies for a rule against persons claiming lots by purchase from the bankrupt, to show cause why they should not be turned out of posession and restrained from interfering with a sale by the assignee, and they appear before the register and defend on the merits, and then fail to except to his report, on which the rule is made absolute, it is too late for them thereafter to seek to have the proceedings set aside as void for want of jurisdiction in the court as a court of bankruptcy.—*In re Currier*, U. S. D. C. (N. J.), 48 Fed. Rep. 161.

15. BOND— Penal—Damages.— Upon a breach of the condition in a bond, a right of action accrues; but only nominal damages are recoverable if no actual damage is apparent,—as where the condition is that the obligor shall erect a house on his own land, in which the obligee is not shown to have any interest.—*Sprague v. Wells*, Minn., 50 N. W. Rep. 535.

16. BOUNDARIES — Detached and Block Surveys.— Where the lines which inclose four surveys in the interior of a block of surveys are marked on the ground by interior lines of the block and by lines peculiar to the four surveys, the lines which separate them from each other cannot be located by marks on the lines which inclose the block.—*Ferguson v. Bloom*, Penn., 23 Atl. Rep. 49.

17. CARRIERS OF PASSENGERS — Ejection — Sunday.— The fact that the trespass occurred on Sunday is no defense, since the action was not based on a breach of contract, but the violation of a personal right assured by law on plaintiff's compliance with defendant's regulations.—*Chicago, St. L. & P. R. Co. v. Graham*, Ind., 29 N. E. Rep. 170.

18. CHATTEL MORTGAGES — Rights of Mortgagee. — Where a chattel mortgage is given to secure a debt, and the mortgagor is to retain the possession of the property until default shall be made in the payment of the debt, or until the mortgagee shall deem himself insecure, the mortgagee may afterwards take the possession of the mortgaged property whenever default shall be made in the payment of the mortgage debt, or when the mortgagee shall deem himself insecure.—*Jones v. Annis*, Kan., 28 Pac. Rep. 157.

19. CHECK—Pleading.—The drawing and delivery of a check implies the indebtedness of the drawer to the payee to the amount of the check, and in an action upon the check it is unnecessary to aver in the declaration any further consideration.—*McClain v. Lowther*, W. Va., 13 S. E. Rep. 1003.

20. CONSTITUTIONAL LAW—Animals Running at Large. —The charter of a city or town located in this State, and the ordinances ordained by its council in pursuance of the provisions of sections 28 and 29 of chapter 47 of the Code, may, as an act of police regulation and power, provide for the taking up and impounding cattle, hogs, horses, sheep, and other animals found running at large in the public streets during the night, and for selling them to pay charges for impounding, etc., without judicial inquiry or determination, upon notice being given to the owner.—*Burdett v. Allen*, W. Va., 13 S. E. Rep. 1012.

21. CONSTITUTIONAL LAW—Book Canvasser's License. —An ordinance of the city of Titusville, Pa., requiring the payment of a license fee from all persons soliciting orders for goods, books, etc., is void as a regulation of interstate commerce, in so far as it is applied to an agent soliciting orders for books, to be filled on the approval of his principal in New York, notwithstanding that the books are sent from a storehouse in Pittsburg, which is kept replenished from the main office in New York; and, when such agent is imprisoned for a violation of the ordinance, he is entitled to be released by the federal circuit court on a writ of *habeas corpus*.—*In re Nichols*, U. S. C. C. (Penn.), 48 Fed. Rep. 164.

22. CONSTITUTIONAL LAW — Exemption of Seamen.— Section 6 of the act of 1889, providing that no officer or seaman of a sea-going vessel or ship shall be arrested or imprisoned for debt, etc., is not in conflict with section 20 of the bill of rights, which provides that no law shall be enacted granting to any citizen or class of citizens any privilege or immunity which upon the same terms shall not equally belong to all citizens.—*In re Oberg*, Oreg., 28 Pac. Rep. 130.

23. CONSTITUTIONAL LAW—Tie Vote.—A statutory provision that when, in any election, there is a tie vote, the judges of election shall determine by lot to which of the opposing candidates the certificate of election should be given, is not in violation of Const. Ind. art. 2, § 13, providing that all elections shall be by ballot, since it deprives no elector of his vote, and gives to each vote its full force and weight.—*Kimerer v. State*, Ind., 29 N. E. Rep. 178.

24. CONTRACT — Consideration.—While it is necessary that the consideration of a promise should be of some value, it is sufficient if it be such as could be valuable to the party promising; and the law will not enter into an inquiry as to the adequacy of the consideration, but will leave the parties to be the sole judges of the benefits to be derived from their contracts, unless the inadequacy of consideration is so gross as of itself to prove fraud or imposition. — *Judy v. Louderman*, Ohio, 29 N. E. Rep. 181.

25. CONTRACT—Delivery—Parol Evidence.—An agreement to deed a right of way through a certain land, in consideration of the construction of the road, may be shown by parol evidence to have been delivered to the

president of the road, on condition that it should not be used unless the withholding of it would defeat the building of the road, or the board of directors of the road should make compensation for the right of way.—*Humphreys v. Richmond & M. R. Co.*, Va., 13 S. E. Rep. 985.

26. CONTRACT — Married Woman. — When a married woman employed her husband to negotiate a sale of her real estate, and in such negotiation she made false representations, upon an action by the purchaser to rescind the sale the representations are to be held as though made by herself. She cannot retain the benefits of his negotiations, and repudiate the means by which they were obtained.—*Knappen v. Freeman*, Minn., 50 N. W. Rep. 533.

27. CONTRACT — Mistake. — Where defendants in an action on a contract allege that they entered into the contract under a mistake, and there is no evidence that plaintiff knew that defendants had made such mistake, there is no such mutual mistake as to defeat a recovery under the contract.—*Crane v. McCormick*, Cal., 28 Pac. Rep. 223.

28. CONTRACT — Parol Evidence. — An agreement that "all matters and things embraced by the within contract have been fully adjusted and settled, and this contract is, for value received, declared ended and settled," cannot, in the absence of fraud or mutual mistake, be shown by parol testimony to have referred only to money accounts between the parties to the contract and not to have included a covenant therein, on the part of the party paying the consideration for the release, not to engage in a certain business with anyone else for a certain time.—*Bonsack Mach. Co. v. Woodrum*, Va., 13 S. E. Rep. 994.

29. CONTRACT — Performance. — Plaintiff offered by letter to furnish defendants a certain grade of coal, at a price named, for certain steam-boats for one year, which defendants accepted by letter. Before the year expired defendants sold the steam-boats, and received no more coal: *Held*, that though the quantity of coal to be delivered was indefinite, it was determinable by the terms of the contract, and therefore the contract was complete and valid for the entire year.—*Wells v. Alexandre*, N. Y., 29 N. E. Rep. 142.

30. CONTRACT—Rescission—Married Woman—Rights of Bona Fide Purchaser.—Where a woman repudiates a contract for the sale of land on the ground that it was made during coverture, her assignee of the vendee's notes for deferred payments has an equitable lien upon the land for the entire amount, and not merely for the consideration paid by him for them, since his recourse against the vendee is lost by her wrongful act.—*Newman v. Moore*, Ky., 17 S. W. Rep. 740.

31. CORPORATIONS.—As against creditors of a corporation which has had sufficient existence to contract debts, neither it nor its stockholders can set up a defect in its charter.—*Hamilton v. Clarion, M. & P. R. Co.*, Penn., 23 Atl. Rep. 53.

32. COURTS — Salary of Probate Judge.—A probate judge is entitled to be paid the salary provided for by paragraph 2524, Gen. St. 1889, without proof that he had actually performed the services contemplated by the "act relating to intoxicating liquors."—*Board of County Commissioners v. Collins*, Kan., 28 Pac. Rep. 175.

33. CRIMINAL EVIDENCE.—It is not competent for parol proof to be made of the purport and effect of the testimony of absentees from the State, who were present and testified on a former trial.—*State v. Oliver*, La., 10 South. Rep. 201.

34. CRIMINAL EVIDENCE — General Reputation.—A witness for defendant, on a trial for the larency of a cow, having testified that defendant's general reputation for honesty was good, was asked on cross examination if he had not heard of defendant's having been indicted for the larency of other cattle, and that defendant had been charged with violating the revenue laws by selling whisky without a license: *Held*, that although such evidence would not have been admissible for the purpose of rebutting defendant's evidence of good character, it was admissible in cross-examination to determine the credibility of the witness and the sources from which his knowledge was obtained.—*State v. Crow*, Mo., 17 S. W. Rep. 745.

35. CRIMINAL EVIDENCE — Larency.—On the trial of a book-keeper of a bank for the larency of money from the bank, evidence as to the financial condition of defendant before the alleged larency, and as to certain expenditures by him afterwards, is admissible.—*Perrin v. State*, Wis., 50 N. W. Rep. 516.

36. CRIMINAL LAW—False Pretenses.—An indictment will not lie upon a mere false warranty, nor upon representations to be implied from mere promises or contract obligations. But, although there be a warranty or contract on the part of the defendant, if there be also false representations of fact, an indictment will lie, provided the representation, and not the warranty or contract, induced the act of the other party.—*State v. Butler*, Minn., 50 N. W. Rep. 532.

37. CRIMINAL LAW — Homicide.—In case the proof shows that the accused was the aggressor in the affray which resulted in the homicide, proof of an attack made by the deceased upon the accused on the day previous thereto is inadmissible for the purpose of establishing the *status* of the accused as acting in his own right, or that he acted at the time of the homicide under the belief that he was in imminent danger of death or of great bodily harm.—*State v. Jefferson*, La., 10 South. Rep. 199.

38. CRIMINAL LAW—Swindling—Representations as to Wealth.— Representations by a party applying for credit, that he was perfectly solvent, and responsible for his debts, and was good for his obligations, are representations of his respectability and wealth, and, if false, are within section 4587 of the Code, which declares that, "if any person, by false representation of his own respectability, wealth, or mercantile correspondence and connections, shall obtain a credit, and thereby defraud any person or persons of any money, goods, chattels, or other valuable thing, such person so offending shall be deemed a cheat and swindler."—*Hathcock v. State*, Ga., 13 S. E. Rep. 959.

39. CRIMINAL TRIAL — Witness.—Where a witness nine years old, had never been in the court-house before, did not know when he was born nor the nature of an oath, but did know that people were sworn in order to make them tell the truth, and said that he himself would tell the truth, and his testimony indicated intelligence, the question of his capacity as a witness is for the judge.—*State v. Doyle*, Mo., 17 S. W. Rep. 751.

40. DEED — Building Restrictions.—A decree ordering defendant to remove certain projections of its house, "with the foundation walls sustaining the same," "so that the entire space shall be on the same face as the main front wall," did not require the foundations under ground to be removed.—*Attorney General v. Algonquin Club*, Mass., 29 N. E. Rep. 209.

41. DEED—Description — Riparian Rights.—The owners of a mill dam and pond conveyed land on the west side thereof, describing the boundaries in the deed as "running easterly to low-water mark, on the west side of Fox river, [the mill-pond;] thence running northerly along the low-water mark on the said westerly side of Fox river," etc: *Held*, that the grantees took only to low-water mark, and not to the center thread of the river.—*Allen v. Weber*, Wis., 50 N. W. Rep. 514.

42. DEED.—In a suit to declare a deed absolute in form to be a mortgage, which was admitted to have been given originally as security for the payment of certain notes, where defendant relied on a subsequent settlement and an agreement by parol that the sale be considered absolute without a further deed, the evidence of such settlement and agreement being conflicting with the weight in favor of plaintiffs, the relief will be granted on payment of the debt and interest in full.—*Marshall v. Williams*, Oreg., 28 Pac. Rep. 137.

43. DEED BY MARRIED WOMAN.—A conveyance of land executed by a married woman in payment of her hus-

band's debt, though declared by the statute absolutely void, is only so as against her, and upon her election to treat it as void; coverture being a personal privilege, which is not available in behalf of a stranger to her title.—*Palmer v. Smith*, Ga., 13 S. E. Rep. 956.

44. DESCENT AND DISTRIBUTION.—All the heirs of an estate except W. conveyed to the latter all their interest in certain property. By W it was conveyed to B, who petitioned for distribution to her. Notice was served on all parties interested, and the fact of B's ownership was before the court. No opposition was made to such petition: *Held*, that the prayer of B's petition should have been granted.—*In re Vaughn's Estate*, Cal., 28 Pac. Rep. 221.

45. EASEMENTS—Alteration.—Where defendant is the owner of an easement to run water in an open ditch over plaintiffs' land, and undertakes to lay pipes in the ditch of no greater carrying capacity than the ditch, the proposed alteration is such as tends to substitute a new and different servitude.—*Allen v. San Jose Land & Water Co.*, Cal., 28 Pac. Rep. 215.

46. EASEMENTS—Water-rights.—The original owners of a strip of land lying between a river and a street built a dam across the river, and also constructed a mill-race along the side of the strip next the street. They then divided the tract into lots known as the "J Water-Power Lots," leaving a road way about 20 feet wide between the race and the lots, to be used as a right of way by the owners of the lots. Viewed without connection with the mill-race, the lots were of little value. Several were conveyed with the right to draw and use water from the dam, and the grantees were adjudged to be the owners of the dam and water-power: *Held*, that the fee of the road way and the land under the mill-race was in the owners of the lots, subject to the easement of the water-power owners to draw water from the dam.—*Smith v. Chicago, M. & St. P. Ry. Co.*, Wis., 50 N. W. Rep. 497.

47. EJECTMENT — When Lies.—Where owners of land enters into a parol contract with a railroad company authorizing it to take the possession of a portion of his land for a right of way, and to construct its railroad across the same, for which the railroad company agrees to pay him $75, and the railroad company, with the knowledge and consent of the owner, takes the possession of the property, and constructs its railroad across the same, but does not pay him the $75, nor any part thereof, the owner cannot then maintain an action in the nature of ejectment to evict the railroad company from the premises, and to prevent it from using its railroad, but his remedy is an action for the $75.—*Missouri Pac. Ry. Co. v. Gano*, Kan., 28 Pac. Rep. 155.

48. ELECTIONS AND VOTERS—Australian Ballot Law.—Where a candidate for office makes no timely objections to the ballot, as published by the county clerk, before an election (Rev. St. 1889, § 4778), the former cannot afterward object to the result for any error of the clerk, in admitting names upon the official ballot not properly entitled to be there.—*Bowers v. Smith*, Mo., 17 S. W. Rep. 761.

49. EMINENT DOMAIN—Access to Premises.—Where defendant erects an abutment of stone and an earth embankment about 14 feet high on a street in front of plaintiff's premises, and thereon operates its road, leaving but a narrow space between it and the plaintiff's premises, insufficient to admit of the approach of a team and vehicle, and plaintiff has no other access to his property, plaintiff has a right of action for damages, even though defendant is acting in pursuance of an act of the legislature, and the city commissioners have discontinued that portion of the street under the authority of said act.—*Egerer v. New York Cent. & H. R. R. Co.*, N. Y., 29 N. E. Rep. 95.

50. EQUITY—Deed.—A bill in equity by the guardian of an insane person against the wife of plaintiff's ward, alleging that defendant by fraud and undue influence procured conveyances and tranfers of all his property, and that the next day a pretended marriage was entered into between them, and that at said times plaintiff's ward was, and ever since had been, insane, and seeking to avoid said conveyances and transfers, may be maintained in the name of his ward.—*Lombard v. Morse*, Mass., 29 N. E. Rep. 205.

51. EVIDENCE—Opinion Evidence—Contract. — In an action for work and labor performed, it is proper for plaintiff to put to ordinary witnesses hypothetical questions in regard to the value of the services alleged to have been performed.—*Graves v. Pemberton*, Ind., 29 N. E. Rep. 177.

52. EXECUTORS AND ADMINISTRATORS — Parent and Child.—A claim by a child upon his parent's executor for services rendered the parent, although it may be stated in general terms, is properly rejected, unless it clearly shows a promise on the part of the parent to pay for the same. — *Wilkes v. Carnelius*, Oreg., 28 Pac. Rep. 135.

53. FEDERAL COURTS—Supreme Court. — The act establishing the circuit court of appeals (26 St. U. S. 826) provides in section 5 that appeals or writs of error may be taken from the district courts or the existing circuit courts direct to the supreme court "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court" for decision: *Held*, that the omission of the word "final" from this provision does not enlarge the power of review so as to permit a cause to be brought up before final judgment.—*McLish v. Roff*, U. S. S. C., 12 S. C. Rep. 118.

54. FRAUDS, STATUTE OF—Antenuptial Contract.—An antenuptial contract, by which each party is to retain the title of his or her property, and dispose of it as if unmarried, is a contract in consideration of marriage, within the statute of frauds (Gen. St. ch. 22, § 1), and must be in writing.—*Mallory's Adm'r v. Mallory's Adm'r*, Ky., 17 S. W. Rep. 737.

55. FRAUDS, STATUTE OF—Memorandum.—If the owner of land signs a writing or memorandum, wholly executory, agreeing to convey the land therein named to W, who does not sign by himself or agent, and W does not take possession of the land, or in any other way make part performance, W cannot be charged in an action upon the writing or memorandum, which he has not signed.—*Guthrie v. Anderson*, Kan., 28 Pac. Rep. 164.

56. FRADULENT CONVEYANCES.— Where an insolvent debtor, being pressed by his creditors, executes a chattel mortgage upon his personal property to pay or secure for his attorney $500, most of which is in consideration of future legal services, such mortgage is an unlawful withdrawal of that which justly belongs to the *bona fide* creditors of the insolvent debtor, and operates to delay and defraud his creditors in the collection of their debts.—*Shellabarger v. Mottin*, Kan., 28 Pac. Rep. 199.

57. FRAUDULENT CONVEYANCES—Appointment of Receiver.—In so far as the petition in this case rests on the insolvent traders' act or on the assignment act, it is unsupported by the facts in evidence. Granting that the evidence makes a *prima facie* case of fraudulent conveyance by an insolvent firm of all of its property to a single creditor, to the injury of the other creditors, the purchasing creditors being solvent and able to respond, and the complaining creditors being without judgments or other liens, and having no claim to the property by reason of fraud in the creation of their demands or otherwise, no sufficient cause for an interlocutory injunction and receiver as to this property appears.—*Stillwell v. Savannah Grocery Co.*, Ga., 13 S. E. Rep. 963.

58. FRAUDULENT CONVEYANCES—Preferences.— Where one sells a stock of goods at its fair value, and receives payment in the discharge of an antecedent debt, and the notes of the purchaser for the balance, and the notes, together with his remaining personalty, do not exceed in value the amount of exemption to which he is entitled, the effect of the transaction is to make an authorized preference among the seller's creditors, and secure to him a sum of money which is not liable

to his other debts; and the fact that notes were taken in part payment of the purchase does not render the the transaction fraudulent.—*Brinson v. Edwards*, Ala., 10 South. Rep. 219.

59. GIFTS—Evidence.—A father whose assets were about $80,000, and his liabilities less than $10,000, gave to a minor son a half interest in a note, which was worth about $2,000. The name of the son and that of another child were written on the note, which was then handed to the mother to keep. The father collected the interest and principal when due: *Held*, that the delivery was sufficient to perfect the gift.—*Second Nat. Bank v. Merrill & Houston Iron Works*, Wis., 50 N. W. Rep. 603.

60. HIGHWAYS—Establishment.—Where no notice is given to one of the owners through whose land a public highway is laid out, nor any finding made by the board of county commissioners that the land-owner is a non-resident of the county, the want of jurisdiction by the absence of notice or such a finding is cured by the presentation by him to the board of county commissioners to claim for damages in consequence of the opening of the road through his land.—*Hedeen v. State*, Kan., 28 Pac. Rep. 203.

61. HIGHWAY—Notice.—Under Hill's Code, § 4063, providing that when any petition is presented to the county court "for laying out, alteration, or vacation of any county road it shall be accompanied by satisfactory proof that notice has been given by advertisement" to all persons concerned, the proof may be by the affidavit of one of the petitioners, who knows that such notice has been given.—*Gaines v. Linn County*, Oreg., 28 Pac. Rep. 131.

62. HOMESTEAD—Fixtures.—In the sale of personal property that is to be affixed to realty, the contracting parties at the time of the sale have the power, as between themselves at least, to fix the *status* of such property, and to say whether, when affixed to the realty of the vendee, it shall remain personal property or become a part of such realty.—*Marshall v. Bacheldor*, Kan., 28 Pac. Rep. 168.

63. HOMESTEAD—Sale Under Execution.—In an action upon a promissory note, where the court finds that the debt for which such note was given was for lumber and material furnished by the plaintiff and used by the defendant in the erection of a dwelling-house upon his homestead while he was the owner thereof, such finding is conclusive, and where a judgment for the amount due upon such promissory note is rendered upon such finding: *Held*, that under an execution issued upon such judgment the officer may, if no personal property of the judgment debtor can be found, levy upon the homestead to satisfy such execution.—*Tyler v. Johnson*, Kan., 28 Pac. Rep. 198.

64. INSURANCE—Evidence.—One of the questions in an application for insurance was as to the length of time that the plaintiff had been merchandising, and who slept in the store. The answer was, "Four years; watchman on premises at night:" *Held*, that the answer amounted only to a warranty that the plaintiff had a watchman on the premises at the time of the application, not that he would continue to keep one there; and hence the absence of the watchman without the plaintiff's knowledge on the night of the fire was no defense.—*Va. Fire & Marine Ins. Co. v. Buck*, Va., 13 S. E. Rep. 973.

65. INTOXICATING LIQUORS—License—Social Club.—Where a social club purchases liquors in large quantities, and retails them to its members, who, on receipt thereof, sign a ticket with the cost price marked thereon, which tickets are paid monthly, but the members may pay cash at the time they get the liquor, such sales are within the provisions of a city ordinance requiring a license to be paid by places in the city where liquors are retailed.—*Kentucky Club v. City of Louisville*, Ky., 17 S. W. Rep. 743.

66. JUDGMENT—Death of Plaintiff.—The fact that a sole plaintiff, or one of several plaintiffs, is dead at the time of the institution of an action, such death not appearing on the record, does not render a judgment therein void, but only erroneous, and such judgment is a lien on real estate.—*Watt v. Brookover*, W. Va., 13 S. E. Rep. 1007.

67. JUDGMENT—Default—Justice's Court.—Where a judgment rendered on default in a justice's court was set aside on motion of defendant, and on the day set for the new trial plaintiff, by her attorneys, was present and agreed to a continuance, she is deemed to have waived any objections to the order setting aside the default.—*State v. Martin*, Ind., 29 N. E. Rep. 165.

68. JUDGMENT—Lien.—In a contest between a judgment creditor and the assignees of a money demand against a county, the lien of the judgment, not having attached upon the fund before it was brought into court, will not take precedence of the assignments, though they were made after the judgment was rendered.—*Dotterer v. Harden*, Ga., 13 S. E. Rep. 971.

69. JUDGMENT—Vacation for Fraud.—Where a judgment obtained against several defendants is sought to be vacated on account of the fraud practiced by the successful party, and it is also alleged that it is void as to some of the defendants because no service of summons was made upon them, those not served are not confined to the remedy prescribed in the last clause of section 575 of the Civil Code, of having the judgment vacated on motion, but may join with the other defendants in an action to have it set aside for the fraud practiced by those who obtained the same.—*Steele v. Duncan*, Kan., 28 Pac. Rep. 206.

70. JUDGMENT—Validity.—Where a plea of *non assumpsit* unaccompanied by affidavit was stricken out, and the subsequent tender of a plea accompanied by affidavit refused, a final judgment given by the court for plaintiffs was not void, as the court had jurisdiction, though it would have been the duty of the clerk to enter judgment at rules, and therefore its enforcement would not be restrained.—*Grigg v. Dalsheimer*, Va., 13 S. E. Rep. 993.

71. JUDGMENT BY JUSTICE OF THE PEACE.—A judgment of the superior court rendered on appeal from a justice's court is not void so as to be attacked by affidavit of illegality on the ground that the justice's court was not held "at a court-house established according to law," both parties having had their day in the superior court.—*Green v. Alexander*, Ga., 13 S. E. Rep. 946.

72. LANDLORD AND TENANT—Dangerous Premises.—The owner of a tenement-house is liable for injuries to an occupant thereof, caused by the falling of a ceiling in a hallway on the first floor used in common by the tenants on the floors above, and which was the only means of access to their apartments, provided that he knew of the defect that caused the fall.—*Dollard v. Roberts*, N. Y., 29 N. E. Rep. 104.

73. LANDLORD'S LIEN—Priorities.—Where plaintiffs, by their agent, purchased goods subject to a landlord's lien for rent, and the goods remaining in the vendor's possession are sold by regular process to satisfy the lien, the ignorance of their agent that the person from whom the goods were purchased lived in a rented house, which fact was known to the principals, cannot avail them in an action for damages against the landlord for the conversion of the goods.—*Aderhold v. Bluthenthal*, Ala., 10 South. Rep. 230.

74. LAYING OUT HIGHWAY—Writ of Review—Who may Bring.—Under Hill's Code, § 4062, a person through whose land a proposed road is about to be made is a person concerned, and, being entitled to notice, he may prosecute a writ of review to question the regularity of the proceedings of the county court, though he is neither a petitioner for nor a remonstrator against the location of the road.—*Gaines v. Linn County*, Oreg., 28 Pac. Rep. 133.

75. LIMITATION OF ACTIONS—Trespass.—An action against the owner of sheep for damages for trespass committed by them is not affected by Act Feb. 4, 1874, which gave the owner of the land on which the trespass was committed the right to distrain the animals

trespassing, provided proceedings were begun within 60 days; but is governed by the ordinary statute of limitations barring actions for trespass to real property after three years.—*Zimwalt v. Dickey*, Cal., 28 Pac. Rep. 212.

76. LIMITATIONS.—Where a seller of stock fails to deliver them, limitations against his implied promise to refund the purchase money begin to run from the date of his notice to the purchaser of inability to deliver.—*Rose v. Foord*, Cal., 28 Pac. Rep. 229.

77. LIMITATIONS — Public Corporations.—Public corporations, such as lunatic asylums, when clothed with capacity to sue and be sued, are amenable, in actions instituted by such corporations, to the defense of the statute of limitations, as well as to all other defenses, the same as natural persons are amenable.—*McClanahan v. Western Lunatic Asylum*, Va., 13 S. E. Rep. 977.

78. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution upon a charge of malicious trespass, where there was probable cause for commencing the prosecution, and where the defendant, acting upon the advice of attorneys, and believing there was probable cause, in good faith and without malice caused the arrest of the plaintiff, the defendant is not liable to the plaintiff, although one of his purposes was to prevent the construction of a building upon his land.—*Jackson v. Linnington*, Kan., 28 Pac. Rep. 173.

79. MARINE INSURANCE — Condition of Policy.—In a marine insurance policy containing a warranty that the insured vessel should not load more than her registered tonnage, the term "registered tonnage" refers to the vessel's carrying capacity, as stated in the ship's papers under which she was sailing at the date of the policy.—*Reck v. Phœnix Ins. Co.*, N. Y., 29 N. E. Rep. 137.

80. MARINE INSURANCE — Conditions of Policy.—The clause in a cargo policy insuring advances, that "it is understood that freight and advances insured under this policy are subject to the terms and conditions of freight policy attached hereto," means that to the terms and conditions of the cargo policy are added such of the terms and conditions of the freight policy as are pertinent.—*Phœnix Ins. Co. v. Parsons*, N. Y., 29 N. E. Rep. 87.

81. MASTER AND SERVANT—Assumption of Risk.—Application of the rule that a servant assumes the risks of his employment, including those caused by the master's negligent manner of conducting the business, if he knew them, or they are obvious to one of ordinary understanding.—*Bengston v. Chicago, St. P. M. & O. Ry. Co.*, Minn., 50 N. W. Rep. 531.

82. MASTER AND SERVANT — Negligence.—Where the negligence alleged was that the defendant company permitted the accumulation of inflammable, combustible, and explosive coal dust in the mine, and failed to remove or sprinkle the same, proof that the mine was improperly laid out and constructed, or that proper doors or brattices were not supplied, is incompetent and inadmissible.—*Cherokee & P. Coal & Min. Co. v. Wilson*, Kan., 28 Pac. Rep. 178.

83. MASTER AND SERVANT—Vice-principal.—A foreman in charge of laborers in removing the roof of a railroad company's building is the vice-principal of the company, and not a fellow-servant of the laborers.—*Sullivan v. Hannibal & St. J. Ry. Co.*, Mo., 17 S. W. Rep. 748.

84. MECHANIC'S LIENS—Notice.—A notice of lien filed by material-men which fails to name the city or county in which the property sought to be charged is situated, and which contains no statement aiding in its identification, is wholly insufficient to charge the property as against a purchaser without knowledge that the materials were furnished.—*Anderson v. Bingham*, Colo., 28 Pac. Rep. 145.

85. MORTGAGE—Foreclosure.—A sheriff's certificate of sale, made and issued under the provision of Gen. Laws 1862, ch. 19, § 3, in proceedings to foreclose a mortgage upon real property by advertisement, was not invalidated by reason of an error in stating the amount of the promissory note alleged to have been secured by said mortgage. Nor was it invalidated because it described a mortgage bearing date June 3, and acknowledged before a notary on June 4, 1857, as having been executed on the day first above mentioned.—*Cable v. Minneapolis Stock Yards & Packing Co.*, Minn., 50 N. W. Rep. 528.

86. MORTGAGE — Foreclosure Sale. — A purchaser of real property at sheriff's sale made under *fi. fa.* in the foreclosure of a special mortgage, cannot acquire or take title to any other property than that coming within the description recited in the act of mortgage.—*Jones v. Lake*, La., 10 South. Rep. 234.

87. MORTGAGE—Rents.—Where a mortgagee in possession of an undivided half interest in a milling property forms a partnership with another to carry on the business, she will be charged, on an accounting in equity, with the fair rental value or the half interest, notwithstanding that the business resulted disastrously.—*Engleman Transp. Co v. Longwell*, U. S. C. C. (Mich.), 48 Fed. Rep. 129.

88. MORTGAGE — Rescission—Agency.—Where a bill is filed to foreclose a purchase money mortgage, and defendant files her cross bill to rescind such mortgage on the ground that W, one of the complainants, was acting as her agent when she purchased the land, and without her knowledge purchased it from his own firm for her, the burden is on her to show such agency.—*Spratt v. Wilson*, Ala., 10 South. Rep. 209.

89. MORTGAGES — Sale under Trust.—A trustee in a deed of trust executed to him upon a tract of land to secure the payment of money, when required to sell under said trust deed, must be personally present at the time and place of sale, and supervise the same, and cannot delegate his powers to a stranger, authorizing such stranger to make the sale in his absence, unless authorized so to do by the deed of trust.—*Smith v. Lowther*, W. Va., 13 S. E. Rep. 999.

90. MUNICIPAL CORPORATIONS—Condemnation—Public Use.—Under Const. art. 2, § 20, providing that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, the question as to whether the taking is for public use is for the court, and can generally be determined from an inspection of the petition or other pleadings by which the proceeding is instituted.—*State v. Eagleman*, Mo., 17 S. W. Rep. 759.

91. MUNICIPAL CORPORATIONS—Defective Sewers.—In an action to recover damages against defendant city for having created a nuisance on plaintiff's land, the evidence showed that defendant constructed a system of sewers with so narrow an outlet that the sewage and the waters of a natural stream which were taken into the sewer were set back, and when plaintiff connected his drain, by virtue of a permit from defendant for which he had given a consideration, into the sewer, his cellar was overflowed through his drain. The size of the outlet was fixed by the mayor and aldermen at the time of the structure: *Held*, that the action could not be maintained.—*Buckley v. City of New Bedford*, Mass., 29 N. E. Rep. 201.

92. MUNICIPAL CORPORATIONS—Vacating Streets—Injunction.—An injunction will not lie to restrain the enforcement of a city ordinance vacating a street on which none of plaintiffs' property abuts, and plaintiffs merely suffer an inconvenience in common with all other persons.—*Glasgow v. City of St. Louis*, Mo., 17 S. W. Rep. 743.

93. NATIONAL BANKS.—Rev. St. U. S. § 5201, which forbids national banks to make loans on the security of shares of their own capital stock, does not invalidate such a loan, since only the government can take advantage of the breach of the law.—*Walden Nat. Bank v Birch*, N. Y., 29 N. E. Rep. 127.

94. NEGLIGENCE—Dangerous Premises.—The owner of a city lot, who has, with the consent of the city authorities, constructed a vault under the sidewalk in front of

his lot, is not responsible for injuries received by a pedestrian who falls into the vault on account of the breaking of the flag-stone over it, where no actual negligence on the part of the lot-owner is shown.—*Babbage v. Powers*, N. Y., 29 N. E. Rep. 132.

95. NEGOTIABLE INSTRUMENT — Alteration.—Where a note signed by several makers is, after delivery, changed by one of the makers, without the holder's consent, so as to read "We" instead of "I" promise to pay, such change does not invalidate the note.—*Green v. Beckner*, Ind., 29 N. E. Rep. 172.

96. NEGOTIABLE INSTRUMENT — Indorsement and Transfer.—If a negotiable instrument, not payable to bearer, be indorsed specially to a particular person, while such person remains the holder and legal owner the right of action is in him alone, and none but he, or his personal representative, can sue.—*Spence v. Robinson*, W. Va., 13 S. E. Rep. 1004.

97. PARENT AND CHILD — Abandonment.—Where a father leaves his children for years to be supported by their grandmother, and at various times declares his intention never to reclaim them, it is sufficient evidence of their abandonment by him.—*In re Vance*, Cal., 28 Pac. Rep. 228.

98. PARTNERSHIP—Contract by Surviving Partner.—A contract made between a surviving partner, the widow of a deceased partner who left minor children, and a part of the individual creditors of the deceased partner, that the surviving partner should pay a proportionate share of the individual indebtedness of the deceased partner, and retain all the partnership property, is against public policy, and is illegal and void.—*Cox v. Grubb*, Kan., 28 Pac. Rep. 157.

99. PARTNERSHIP — Retiring Partner.—Where three persons compose a partnership under a name, such as the Fulton Lumber & Manufacturing Company, which does not disclose the individual name of any partner, and two of them withdraw, and the third continues business at the same place, and under the same partnership name, a person dealing with him cannot hold the retired members of the firm responsible, if he had never dealt with the firm before dissolution, and had no knowledge of the persons constituting the same, either before the dissolution or at the time of the dealing in question.—*Austin v. Appling*, Ga., 13 S. E. Rep. 955.

100. PATENTS FOR INVENTIONS—Assignment.—An assignment of a patent subject to a previous exclusive license to make and sell the patented article gives the assignee no right to make or sell the patented articles during the existence of the license.—*Waterman v. Shipman*, N. Y., 29 N. E. Rep. 112.

101. PLEDGE.—In case a single collateral is pledged by two separate and distinct contracts to two creditors, whose claims aggregate the value of the collateral, possession by one is a possession for the benefit of the other, and in this respect each is the agent of the other *pro hac vice*.—*Levi v. Winters*, La., 10 South. Rep. 198.

102. PRINCIPAL AND AGENT — Death of Principal.—A contract of agency, merely authorizing the agent to carry on the principal's business while the latter is disabled, vests in the agent no interest in the subject-matter of the agency, and the agency is terminated by the death of the principal, under Civil Code § 2356.—*Krumdick v. White*, Cal., 28 Pac. Rep. 219.

103. PRINCIPAL AND AGENT—Misappropriation of Trust Fund.—One who receives from an agent payment of the agent's debt out of funds belonging to his principal is liable to the principal therefor, where such payment was unauthorized, even though the payment was received in good faith without actual knowledge of the agent's want of authority.—*Gerard v. McCormick*, N. Y., 29 N. E. Rep. 115.

104. PROCESS — Service—Railroad Company.—Service of a summons in an action before a justice against a domestic railroad corporation upon its president must be in the county in which he resides, and the return must show that fact, else it is invalid. A judgment based on a return of service not showing that fact there being no appearance, is void.—*Taylor v. Ohio River R. Co.*, W. Va., 13 S. E. Rep. 1009.

105. RAILROAD COMPANIES — Horse Railroads. — A street-car has no superior right of way as against a vehicle going along a street which crosses the street-car track.—*O'Neil v. Dry Dock, E. B. & B. R. Co.*, N. Y., 29 N. E. Rep. 84.

106. RAILROAD COMPANIES—Injuries—Trespassers.—A charge that, if decedent went upon the trestle without looking and listening for an approaching train, she was guilty of contributory negligence, is irrelevant, since she was a trespasser on the track, and no amount of prudence in attempting to cross the trestle would change her attitude as such.—*Glass v. Memphis & C. R. Co.*, Ala., 10 South. Rep. 215.

107. RAILROAD COMPANIES — Elevated Railroad — Injury to Abutters.—The owner of a city lot, which he has leased after the construction of an elevated road in the street in front of the lot, can maintain an action for damages for the impairment of his easement in the street by the existence and maintenance of the road during the time the lot was in the actual possession of his lessee, where the road has been built without condemning his easement in the street.—*Kernochan v. New York, El. R. Co.*, N. Y., 29 N. E. Rep. 65.

108. RAILROAD COMPANIES—Negligence—Fires.—In an action against a railway company to recover damages caused by fire escaping on the right of way of such company, the fact that the dry grass of the previous season was suffered to remain on the right of way is proper evidence for the jury, and they may find negligence from it.—*St. Louis & S. F. Ry. Co. v. Richardson*, Kan., 28 Pac. Rep. 183.

109. RAILROAD COMPANIES— Railroad Commissioners. —Under the provisions of section 5 ch. 124, Sess. Laws 1883, an order or recommendation of the board or railroad commissioners of the State to a railroad company, requiring repairs to be made upon its road or track to promote the security, convenience, and accommodation of the public, is advisory only. Such an order or recommendation is not final or conclusive upon the railroad company or in the courts.—*State v. Kansas Cent. R. Co.*, Kan., 28 Pac. Rep. 208.

110. RAILROAD COMPANIES— Negligence.— In an action against a railroad company for killing a mule, an instruction that, if the engineer was "on the lookout for obstructions at the time he discovered the mule," defendant was not liable, was properly refused.—*East Tennessee, V. & G. R. Co. v. Baker*, Ala., 10 South. Rep. 211.

111. RAILROAD MORTGAGE — Foreclosure—Sale.—In a proper case, a court of equity has the power so to mould its decree as to order a sale of mortgaged premises to satisfy that part of the mortgage debt which is due, and preserve the lien upon the mortgaged premises in the hands of the purchaser as to the unmatured part of the debt.—*Pennsylvania R. Co. v. Allegheny Val. R. Co.*, U. S. C. C. (Penn.), 48 Fed. Rep. 139.

112. RES ADJUDICATA— Foreclosure.— An equity of redemption owned by an assignee in bankruptcy, as such, is not barred by a foreclosure in which he is made a party, and is served and appears in his individual name only, and in which his official character is in no wise mentioned.—*Landon v. Townshend*, N. Y., 29 N. E. Rep. 71.

113. SALE— Implied Warranty.— In an action to recover for a cargo of ice sold by plaintiffs to defendants, to be shipped from P, Me., to N B, Mass., some of the evidence was conflicting as to whether the ice was identified by the contract, or was to be appropriated thereto by plaintiffs. The court instructed that there was an implied affirmation that the ice was of such kind that it could be shipped to N B, and no other implied warranty: *Held*, that, in either view of the facts, defendants were entitled to an instruction that the word "ice" called for a merchantable article of that name, and that the instruction given was erroneous.—*Murchie v. Cornell*, Mass., 29 N. E. Rep. 207.

114. SALE—Rescission.—A petition by the vendors of

goods against an insolvent purchaser, alleging fraud in the purchase and repudiating the contract of sale on that account, has equity on which to proceed to reclaim the goods or their proceeds in the hands of such purchaser. This equity holds equally whether the term of credit has expired or not. In such case a receiver may be appointed to take charge of money and books of account.—*Martin v. Burgwyn*, Ga., 13 S. E. Rep. 958.

115. SALE BY ASSIGNEE—Collusion.—An agreement between one who becomes a purchaser at the sale of an assignee, and a third person, whereby the latter is for a consideration to abstain from bidding, is, when carried out, and the purchaser thereby gets the property for less than he otherwise would, a fraud on the creditors; and a conveyance thereunder may be set aside at the suit of the creditors, or of one or more suing for the benefit of all, where the assignee, on being requested, refused to bring the action.—*Saxton v. Seiberling*, Ohio, 29 N. E. Rep. 179.

116. SALE OF LAND—Authority of Agents.—Real estate agents wrote asking an owner of land for an opportunity to make a sale for him, and inquiring his terms. The owner replied, at different times, that his "price" for the property was $9,000; that he "would sell" for $10,000; and that he "had concluded to take" $10,000; but nowhere did he expressly authorize them to act as his agents: *Held*, that their authority did not extend to making a sale, but only to transmitting offers for the approval of the owner, and that it was incumbent upon a purchaser to look to their authority.—*Kramer v. Blair*, Va., 13 S. E. Rep. 914.

117. SPECIFIC PERFORMANCE—Pleading—Variance.—Where a bill for specific performance of a contract for the sale of land alleges that the bond for title was executed by A M and M A M, and the evidence shows that it was executed by A M alone, the variance is fatal.—*McDonald v. Walker*, Ala. 10 South. Rep. 225.

118. TAXATION—Defenses.—In proceedings for the recovery of a judgment against real estate for taxes it may be shown, for the purpose of reducing the tax charged upon the land, that the statutory requirement of equality in the assessment had been intentionally disregarded, or that by reason of some perfectly obvious mistake there had been no real assessment upon any rule of equality.—*Otter Tail County v. Batchelder*, Minn., 50 N. W. Rep., 536.

119. TAXATION—Exemption.—Capital, etc., employed in the manufacture of "shoe-uppers," is not employed in the manufacture of "leather," nor in the manufacture of "shoes," and is not exempt under the article 207 of the constitution.—*Ricks v. Board of Assessors*, La., 10 South. Rep. 202.

120. TAXATION—Penalty for False Statement.—A complaint which alleges, in substance, that a taxable person gave to the deputy-assessor a statement purporting to be a full, true, and correct list of all his personal property subject to taxation, which statement was not a full, true, and correct list of such property, but was false and fraudulent, stating the particulars in which the statement was false, sufficiently shows a breach of Rev. St. 1881, § 6339.—*Warner v. State*, Ind., 29 N. E. Rep. 173.

121. TRIAL—Exclusion of Juror.—The mere exclusion of a juror upon a challenge for cause upon insufficient ground will not be cause for reversal.—*Thompson v. Douglass*, W. Va., 13 S. E. Rep. 1015.

122. TRIAL—Judgment on Admissions.—The court is warranted in acting upon the admissions made by parties during the trial of a cause; and where the plaintiff, in making the opening statement of his case to the court and jury, admits or states facts the existence of which absolutely precludes a recovery by him, the court may close the trial at once, and give judgment against him.—*Lindley v. Atchison, T. & S. F. R. Co.*, Kan., 28 Pac. Rep. 201.

123. TRIAL—Juries—Summoning and Impaneling.—Mansf. Dig. Ark. § 4013, relating to jurors, which by Act Cong. May 2, 1890, was extended over the Indian Territory, provides that, if either party shall desire a panel, the court shall cause the names of 24 competent jurors to be placed in a box and entered on a list. Section 4014 provides that each party shall be furnished with a copy of this list, from which each may strike the names of the three jurors, and the 12 names remaining shall constitute the jury: *Held*, that the refusal of the court to furnish the parties, on request, with such list of 18 jurors is reversible error.—*Gulf, C. & S. F. Ry. Co. v. James*, U. S. C. C. App., 48 Fed. Rep. 148.

124. TROVER AND CONVERSION—Chattel Mortgage.—In an action against a sheriff by a chattel mortgagee the lien of whose mortgage is subordinate to a first mortgage and the levy of three several orders of attachment, to recover the amount of his mortgage because of the conversion of the property, it is necessary that a wrongful taking, or a taking made wrongful by subsequent conduct, or a conversion, be established by the evidence.—*Smith-Frazer Boot & Shoe Co. v. Ware*, Kan., 28 Pac. Rep. 159.

125. TROVER AND CONVERSION—Pleading and Proof.—A plaintiff alleging ownership of property at a certain time is not restricted, as to the evidence of such ownership, to the very day fixed in the petition, but may introduce evidence to establish ownership prior to the time stated in the pleading.—*Russell v. Bradley*, Kan., 28 Pac. Rep. 176.

126. TRUST—Trover—Trespass—Evidence.—Where the complaint in an action for damages for the removal of a partition fence contains three counts,—the first in trover, and the others in trespass,—and the evidence shows that plaintiff was in possession of the land on which the fence was, it is error for the court to give an affirmative charge in favor of defendant, since such charge assumes that plaintiff had at the time of the injury neither possession nor the right of immediate possession.—*Garrett v. Sewell*, Ala., 10 South. Rep. 226.

127. VENDOR AND VENDEE—Deed by Corporation.—A purchaser is not bound to accept a title resting on the statute of limitations, or take the risk of determining from facts which he might learn *dehors* the record whether or not the statute of limitations can be successfully pleaded against an adverse claim.—*McCroskey v. Ladd*, Cal., 28 Pac. Rep. 216.

128. WILLS—Annuities.—By his will, testator, after bequeathing $50 to each of his two daughters, to be paid by his executor, directed, at the death of their mother, "each of my two sons, to whom I have given my homestead farm, to give to my two daughters the sum of fifty dollars each yearly, to be paid half-yearly during their lives:" *Held*, that these annuities were not a charge upon the land devised to the sons.—*Larkin v. Larkin*, R. I., 23 Atl. Rep. 19.

129. WITNESS—Criminating Evidence—Gambling.—The provision of Const. art. 2, § 23, that "no person shall be compelled to testify against himself in a criminal cause," does not exempt a witness from disclosing the names of others than himself who have engaged in gaming, since immunity is afforded him by Rev. St. 1889, § 3819, which provides that no person shall be excused from testifying touching any offense committed by another against the gaming act by reason of his having played at any of the prohibited games, "but the testimony which may be given by such person shall in no case be used against him.—*Ex parte Buskett*, Mo., 17 S. W. Rep. 753.

130. WRITS—Amendment of Return.—The court cannot on motion, amend a sheriff's return so as to show a different date of service of process from that certified in the return, where the sheriff is now deceased, and his representatives are not in court.—*Jefferson County Sav. Bank v. McDermott*, Ala., 10 South. Rep. 154.

131. WRITS—Non resident Suitor.—A non-resident suitor, attending court in relation to his suit, in which he is personally interested, although he may also testify in such suit, is not on that account exempt from the service of a writ of summons in another suit.—*Capwell v. Sipe*, R. I., 23 Atl. Rep. 14.